(12)

No. 05-11304 *** CAPITAL CASE ***

Title: LaRoyce Lathair Smith, Petitioner
v.
Texas

Docketed: June 5, 2006
Lower Ct: Court of Criminal Appeals of Texas
Case Nos.: (AP-74228)
Decision Date: March 1, 2006

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 30 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 5, 2006)
Jun 7 2006	Order extending time to file response to petition to and including August 4, 2006.
Jul 28 2006	Order further extending time to file response to petition to and including September 5, 2006.
Sep 5 2006	Brief amici curiae of John J. Gibbons, et al,. filed.
Sep 5 2006	Brief amicus curiae of Constitution Project filed.
Sep 5 2006	Brief of respondent Texas in opposition filed.
Sep 13 2006	Reply of petitioner LaRoyce Lathair Smith filed.
Sep 21 2006	DISTRIBUTED for Conference of October 6, 2006.
Sep 25 2006	Supplemental brief of respondent Texas filed. (Distributed)
Oct 6 2006	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Oct 19 2006	Motion to appoint counsel filed by petitioner LaRoyce Lathair Smith.
Oct 25 2006	Motion DISTRIBUTED for Conference of November 9, 2006.
Oct 31 2006	SET FOR ARGUMENT ON Wednesday, January 17, 2007.
Nov 13 2006	Motion to appoint counsel filed by petitioner GRANTED. Jordan Steiker, Esquire of Austin, Texas is appointed to serve as counsel for the petitioner in this case.
Nov 20 2006	Brief amicus curiae of Constitution Project filed.
Nov 20 2006	Joint appendix filed. Joint appendix in two volumes. (Vol.II oversized.)
Nov 20 2006	Brief of petitioner LaRoyce Lathair Smith filed.
Nov 29 2006	CIRCULATED.
Dec 18 2006	Extension of time within which to file respondent's brief on the merits to and including December 29, 2006.
Dec 26 2006	Record received from Court of Criminal Appeals Texas
Dec 27 2006	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)

Dec 29 2006	Brief of respondent Texas filed. (Distributed)
Dec 29 2006	Brief amici curiae of California, et al. filed. (Distributed)
Jan 3 2007	Motion for divided argument filed by California, et al. (Distributed)
Jan 5 2007	Motion for leave to participate in oral argument as amici curiae and for divided argument filed by California, et al. GRANTED.
Jan 10 2007	Reply of petitioner LaRoyce Lathair Smith filed. (Distributed)

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05-11304

Filed
May 30, 2006

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner LaRoyce Lathair Smith respectfully requests that the Court grant a writ of *certiorari* to review the decision of the Texas Court of Criminal Appeals in his capital proceeding.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as *Ex Parte LaRoyce Lathair Smith*, 185 S.W. 3d 455 (Tex. Crim. App. 2006). It is attached hereto as Appendix 1.

JURISDICTION

On March 1, 2006, the Texas Court of Criminal Appeals issued its opinion denying Mr. Smith's application for a writ of habeas corpus. *Ex Parte Smith*, 185 S.W. 3d 455 (Tex. Crim. App. 2006). No petition for rehearing was filed.

The Court has jurisdiction to review the decision of the Texas Court of Criminal Appeals pursuant to 28 U.S.C. § 1257(a) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the Eighth Amendment to the Constitution of the United States, which provides in relevant part, "nor [shall] cruel and unusual punishments [be] inflicted," and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS BELOW

Just over 18 months ago, this Court summarily reversed the Texas Court of Criminal Appeals ("CCA") on the merits of this case in *Smith v. Texas*, 543 U.S. 37 (2004). That decision reversed the CCA's rejection of Mr. Smith's habeas appeal in *Ex Parte Smith*, 132 S.W.2d 407 (Tex. Crim. App. 2004), attached as Appendix 2. This case is again before this Court after the CCA nonetheless denied relief on remand.

LaRoyce Lathair Smith was convicted of capital murder and sentenced to death in Dallas County, Texas, in June, 1991. The CCA affirmed his conviction and sentence in June, 1994. *Smith v. State*, No. 71,333 (Tex. Crim. App. June 22, 1994) (unpub. decision), *cert. denied*, 514 U.S. 1112 (1995). This decision denying Mr. Smith's direct appeal is attached as Appendix 3. Thereafter, Mr. Smith sought habeas corpus relief in the state courts. His first application for state habeas relief was dismissed as untimely in *Ex Parte Smith*, 977 S.W. 2d 610 (Tex. Crim. App. 1998) (replacing the earlier opinion of April, 1998, reported at 1998 Tex. Crim. App. LEXIS 55). The CCA subsequently authorized the filing of a second application for habeas relief, and Mr. Smith again filed for habeas relief in the instant case in March, 2000. On April 5, 2001, the state trial court recommended that the application be denied, and the CCA adopted that recommendation in *Ex Parte Smith*, 132 S.W. 3d 407 (Tex. Crim. App. 2004), attached as Appendix 2. This Court subsequently summarily reversed the decision of the CCA. *Smith*, 543 U.S. 37 (2004). On remand, the CCA again denied state habeas relief. *Ex Parte Smith*, 185 S.W.

3d 455 (Tex. Crim. App. 2006). *See* Appendix 1. It is that opinion, denying state habeas relief for a second time that is before this Court.

A. Guilt-Innocence Phase of Mr. Smith's Trial

The guilt phase evidence established that Mr. Smith and his accomplices entered a Taco Bell restaurant with the intention of stealing money and that the store manager, Jennifer Soto, was killed in the course of that crime. Mr. Smith was convicted of the capital murder of Jennifer Soto.

Some critical mitigating evidence concerning Mr. Smith's mental deficiencies and difficult family background was introduced during the guilt phase of Mr. Smith's trial. Johnnie Mae Smith, Mr. Smith's mother, testified that Mr. Smith was a slow learner in school and underwent a great deal of testing. SF 28:129, 130.[1] He failed first grade and was in special education programs throughout school. SF 28:130. By the age of 18, Mr. Smith had reached only the 9th grade. SF 29:34. The crime was committed when Mr. Smith was 19 years old. SF 29:21.

Johnnie Mae Smith also testified about Mr. Smith's father, Leroy Smith. Leroy Smith had been to the penitentiary for robbery. SF 28:126. He was involved in a motorcycle gang, caroused with other women, and abused alcohol and drugs, especially crack cocaine. SF 28:134-135. Leroy Smith stole from his family to support his drug habit, SF 28:135-137, and this situation greatly disturbed all of the members of the family, including LaRoyce Smith. SF

[1] References to the trial transcript, in Texas (in 1991) called the "statement of facts," are "SF" followed by the volume and page number.

28:138.

B. Penalty Phase of Mr. Smith's Trial

1. Testimony

The defense offered additional evidence of Smith's cognitive impairments and difficult background in the penalty phase of the trial. Alberta Pringle, records coordinator for the special education department for the Dallas Independent School District, testified that Mr. Smith had been identified at the earliest stages of his schooling as a slow learner with learning disabilities and speech handicaps. SF 32:17-42. Testing through the school district indicated that Mr. Smith's verbal I.Q. was 75 and full scale I.Q. was 78. SF. 32:33-34. A report prepared by Richard Adams, the director of health services for the Dallas Independent School District, SF 32:23, concluded on the basis of Mr. Smith's history and physical exam that Mr. Smith's learning problems were possibly organic in nature. SF 32:28.

Various family and community members confirmed the turbulent home life caused by Mr. Smith's father. Reverend Samuel Nicks, Mr. Smith's pastor, testified that he was aware that Mr. Smith's father had stolen from his family to support his drug habit. SF 32:10-11. He also testified that such behavior has an especially devastating impact on adolescent children. SF. 32:11. Dorothy Faye Ellis, a good friend of the family, testified that Mr. Smith's family situation affected him greatly, especially the economic hardship wrought by his father's thefts. SF. 32:92-93.

2. Sentencing Instructions

Mr. Smith's jury was required to answer the same special issues on deliberateness and future dangerousness as were at issue in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*):

> 1. Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result?
>
> 2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

Affirmative answers to both questions required imposition of the death sentence.

The jurors were also provided with a nullification instruction that they could disregard the content of the special issues if they believed that mitigating evidence – including evidence with "no relationship to any of the Special Issues" – led them to conclude "that the death penalty should not be imposed." The full nullification charge is attached as Appendix 4.

Petitioner objected to the special issue scheme in three separate pretrial motions on the ground that the scheme did not afford adequate consideration of his mitigating evidence and that state law precluded supplementing the special issues with an unauthorized mitigation charge.[2]

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[2] Motion to Declare Tex. Code Crim. Proc. Ann. Art. 37.071 Unconstitutional, Index on Direct Appeal (Cause No. F91-22803-TR), 78, 80 (" The Defendant further maintains that TEX. CODE CRIM. PROC. ANN. Art. 37.071 is unconstitutional because it does not provide for the introduction and subsequent use by the jury of mitigating evidence which is not relevant or material to the special issues. There is no provision in Texas for the jury to decide the appropriateness of the death penalty taking into consideration the personal moral culpability of the Defendant balanced by mitigating evidence which is not directly or circumstantially probative in answering the special issues. There is no provision in the current statutory scheme for the jury to render its verdict that the death penalty should not be inflicted because of mitigating evidence of this type.") (this pretrial motion is attached as Appendix 5); Motion to Reveal Mitigation Charge, Index on Direct Appeal (Cause No. F91-22803-TR), 87 ("The Defendant in good faith herein advises the Court that he believes that during the punishment stage of this trial for the offense of capital murder he will be able to offer evidence in mitigation which has relevance beyond the parameters of the special issues contained in TEX. CODE CRIM. PROC. ANN. art. 37.071.") (this pretrial motion is attached as Appendix 6).

The trial court acknowledged petitioner's objections to the charge and denied both motions at the charging conference.[3]

During the closing arguments on the punishment phase, the prosecution emphasized the jurors' obligation to answer the special issues truthfully. Reminding the jurors of voir dire, the prosecution insisted on honesty:

> Now, when we talked to you on voir dire, we talked to you about – and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, 'Mr. Nancarrow, Ms. McDaniel, if you prove to me that the answers to those special issues should be yes, then I can answer them yes.' If you wavered, if you hesitated

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Trial counsel also took the position that the defect in the Texas special issue scheme could not be cured by the submission of an ad hoc supplemental instruction not authorized by the Texas Legislature: "The exclusive methodology for submission to the jury of the special issues with regard to infliction of the death penalty are contained in TEX. CODE CRIM. PROC. ANN. Art. 37.071. This Honorable Court, as a trial court, can do no more than follow the law as it currently exists in the State of Texas. Therefore, the trial court is precluded in providing any instruction with regard to mitigating evidence .... For the trial court to create a scheme that would permit the jury to respond to the Defendant's mitigating evidence would contradict the current status of the law." Motion to Declare Tex. Code Crim. Proc. Ann. Art. 37.071 Unconstitutional as Applied, Index on Direct Appeal (Cause No. F91-22803-TR), 73, 75. This pretrial motion is attached as Appendix 7. In all of these motions, petitioner repeatedly cited the relevant precedent of *Penry v. Lynaugh*, 492 U.S. 302 (1989).

[3] The following exchange appears on the record:

> THE COURT: The two motions to declare Texas Code of Criminal Procedure Annotated, Article 37.071, Section 3701 unconstitutional as applied, I read those and sort of read them and put them in my mind together. Is there anything not included in those motions that your wish to supplement orally?
>
> MR. MANASCO: No, Your Honor.

SF VI: 3. This portion of the transcript appears as Appendix 8.

Immediately after this exchange, the trial judge asked counsel whether he wanted to word the mitigation charge differently:

> THE COURT: "If you see something in that charge that you'd like worded differently or you think could be made clearer or better, I'm always willing to entertain different wording or different ways of putting the idea."

SF VI: 3. This portion of the transcript also appears in Appendix 8.

In light of trial counsel's position that the legislature must authorize departures from the statutory special issue language, trial counsel declined to request alterations to the nullification instruction.

one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now.

SF 33:20.

On voir dire, the prosecution repeatedly asked prospective jurors, including jurors who ultimately served, whether they could answer the special issues honestly and without attempting to achieve a particular sentence – life or death. For example, in the voir dire of Lynn Bartholomew, who served on Mr. Smith's jury, the prosecution wanted to ensure that she would not engage in any sort of nullification in answering the two special issues:

> Q. You take them independent. You can take them in either order. You can start with the second one first. They're just labeled one and two, but that doesn't mean you have to take them that way. You're supposed to take them independent of each other based on all the facts, let the facts determine what the answer is. By that, I mean don't answer them to get a desired result. Some people say, 'Well, if I find that he killed someone intentionally, I want him to die. So, I'm going to answer these yes to get that result regardless of the facts.' What we have to have are jurors that will tell us despite the fact that I found him guilty of capital murder and wanting a specific result, I will answer the questions based on the facts regardless of what the [sic] means, live or die. Do you think you can do that?
> A. Yes, I do.
> Q. Just let the facts and the circumstances dictate the way the answers to the questions should be answered regardless of the effect it has, either be a life or death sentence.
> A. I think I could.

SF 20:184-85.[4]

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[4]After this colloquy, defense counsel appeared to recognize the tension between the nullification instruction, which invited jurors to answer the special issues dishonestly in order to give effect to mitigating evidence, and the prosecution's anti-nullification comments, which told jurors not to answer the questions untruthfully to achieve a particular result. Accordingly, he sought to reassure Lynn Bartholomew that she could "change" one of her answers without truly "cheating or lying":

> Q. . . . Like the prosecutor was telling you, the court will indicate that if you believe through what's called mitigating evidence - that's really anything. It's stuff that you could hear in the guilt-innocence phase; it's stuff that you could hear in the punishment phase; it's the whole totality of circumstances - if you felt that

The jury verdict form did not include any mention of mitigating evidence, or of the ability of jurors to change their answers on the basis of such evidence, and asked only for answers to the two special issues:

SPECIAL VERDICT NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, LaRoyce Lathair Smith, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict, your will answer "Yes" or "No."

ANSWER:_____ [signature lines].

SPECIAL VERDICT NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, LaRoyce Lathair Smith, would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict, your will answer "Yes" or "No."

ANSWER:_____ [signature lines].

The jury verdict form is attached as Appendix 9. The jury answered both issues affirmatively, and Mr. Smith was sentenced to death.

HOW THE ISSUES WERE DECIDED BELOW

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he shouldn't die, then you're authorized - actually the court says you shall, which is legal mumbo-jumbo for must, change one of the answers from 'yes' to 'no' if you feel that he should not die. Do you have any problem with that?

A. No.

Q. Okay. I mean, it's not like you're cheating or lying or doing something -

A. No.

SF 20:205

On direct appeal, Mr. Smith raised a claim under *Penry I*, arguing that the Texas special issues on deliberateness and future dangerousness did not provide an adequate vehicle for giving effect to his mitigating evidence of low intelligence and turbulent family background. The CCA rejected this claim in an unpublished opinion without discussion, relying on a previous decision that found a similar nullification instruction to be sufficient. *Smith v. State*, No. 71,333, at 11 (Tex. Crim. App. June 22, 1994) (citing *Fuller v. State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992)), attached as Appendix 3.

In this state habeas proceedings, Mr. Smith again sought relief under *Penry I*, and the trial court recommended that the claim be denied. The trial court recommended that the claim not be entertained because it had been addressed on direct appeal; the trial court also concluded that Mr. Smith's mitigating evidence did not necessitate a supplemental instruction under the decisions of the CCA.

Before the CCA acted on the trial court's recommendation, this Court announced its opinion in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). In *Penry II*, this Court held, as in *Penry I*, that the special issues did not provide an adequate vehicle for the jury to give effect to the defendant's mitigating evidence. More particularly, this Court found in *Penry II* that the *Penry I* problem was not cured by additionally instructing jurors to answer the special issues dishonestly if they believed that mitigating evidence justified a sentence less than death. 532 U.S. at 796-804. In light of this Court's intervening decision in *Penry II*, the parties filed supplemental briefing on Mr. Smith's claim regarding the adequacy of the special issues and the supplemental nullification instruction to facilitate consideration of his mitigating evidence. The

matter was argued to the CCA on March 22, 2002, with the oral argument focused entirely on whether *Penry I* and *Penry II* required state habeas relief for Mr. Smith.

After oral argument in the CCA but before the CCA issued its ruling, this Court granted certiorari in two further cases involving the adequacy of the Texas special issues to facilitate consideration of mitigating evidence. *Smith v. Dretke*, 539 U.S. 986 (2003),[5] and *Tennard v. Dretke*, 540 U.S. 945 (2003). Although both of these cases potentially bore on the appropriate resolution of Mr. Smith's claims,[6] the CCA issued its opinion just before this Court issued its decision in *Tennard*. 542 U.S. 274 (2004).[7]

The CCA concluded that Mr. Smith's evidence of cognitive deficits and a turbulent childhood did not require a supplemental instruction under *Penry I*. The CCA maintained that Mr. Smith had failed to establish the presence of a "severe and permanent handicap," *Ex parte Smith*, 132 S.W. 3d at 415, and that he had "offered no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder." *Id.* at 414. In this respect, the CCA fully embraced the test that was rejected by this Court's intervening decision in

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[5] Although the caption in the case is "*Smith v. Dretke*," the defendant's real name in that case is Robert McBride and is in no way connected to LaRoyce Lathair Smith.

[6] The question presented in *Smith v. Dretke* read:

> Did the Court of Appeals misapply *Penry v. Johnson*, 532 U.S. 782 (2001) by imposing a requirement that evidence demonstrate a 'uniquely severe permanent handicap' in order for a Texas capital murder defendant to claim that the use of a 'nullification' instruction was improper?

The first question presented in *Tennard v. Dretke* read:

> Is the Fifth Circuit's rule requiring a 'nexus' to the crime before evidence of impaired intellectual functioning and judgment can be considered as mitigation for purposes of determining whether there is a violation of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) inconsistent with the rationale of *Atkins v. Virginia*, 536 U.S. 304 (2002)?

[7] *Smith v. Dretke* was dismissed as moot pursuant to Rule 46.1 (agreement of the parties) after the sentence of

Tennard.[8]

In addition, the CCA asserted without discussion that the mitigating qualities of Mr. Smith's cognitive limitations could be adequately addressed via the deliberateness special issue. *Ex parte Smith*, 132 S.W. 3d at 414-15 ("[a]pplicant's mental limitations were surely relevant to whether he acted deliberately in committing this robbery-murder"). The CCA also maintained that Mr. Smith's troubled background and low intelligence might not necessarily require an affirmative finding to the dangerousness special issue on the theory that Mr. Smith might be able to learn from his mistakes. *Id.* at 415.

The CCA also attempted to distinguish the nullification instruction given in Mr. Smith's case from the instruction rejected as inadequate by this Court in *Penry II*. According to the CCA, the instruction in Smith's case unequivocally informed jurors of their power and duty to nullify. According to the CCA:

> These instructions expressly authorized and required the jury to answer 'No' to at least one of the special issues if it believed that the death penalty was not warranted because of the mitigating circumstances. The trial court's instructions clearly informed the jury that mitigation evidence 'trumped' the special issues.

Ex parte Smith, 132 S.W. 3d at 416 (footnote omitted).

In denying relief, a majority of the judges of the CCA refused to impose a procedural bar to Mr. Smith's individualization claim, though four of the nine judges asserted that the claim was procedurally barred. *Id.* at 423 (Hervey, J., joined by Keasler, J., concurring), and 428 (Holcomb, J., joined by Price, J., concurring).

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the petitioner (Robert McBride) had been commuted to life imprisonment. 541 U.S. 914 (2004).

[8] *Tennard*, 542 U.S. at 289 ("We hold that the Fifth Circuit's 'uniquely severe permanent handicap' and 'nexus' tests are incorrect, and we reject them.").

This Court summarily reversed the decision of the CCA. *Smith*, 543 U.S. 37 (2004). First, this Court rejected the state court's reliance on "precisely the same 'screening test' we held constitutionally inadequate in *Tennard*." *Id.* at 44.[9] This Court declared "[t]here is no question that a jury might well have considered petitioner's IQ scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death." *Id.* This Court also disapproved of the CCA's application of the nexus requirement rejected in *Tennard*, finding that "the state court, however, erroneously relied on a test we never countenanced and now have unequivocally rejected. We therefore hold that the state court 'assessed [petitioner's legal] claim under an improper legal standard.'" *Id.* at 45 (citations omitted).

Second, this Court rejected the state court's claim that the nullification in Smith's case was less problematic than the one this Court rejected in *Penry II*. According to this Court, "[a]lthough there are some distinctions between the *Penry II* supplemental instruction and the instruction petitioner's jury received, those distinctions are constitutionally insignificant." *Id.* at 46. This Court emphasized that the clarity of nullification instruction to the jurors in petitioner's case – telling them explicitly of their power to change their honest answers to the special issues if they believed a life sentence was appropriate - did not avoid the "ethical problem" endemic to nullification instructions. In fact, this Court maintained that "the clearer instruction given to petitioner's jury . . . could possibly have intensified the dilemma faced by ethical jurors." *Id.* at 47-48.[10] Lastly, this Court noted that the mitigating evidence in Smith's case, as in Penry's,

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[9] This Court observed that "[f]our judges would have found petitioner's claim procedurally defaulted," and that "[t]he majority of the court, however, declined to adopt this holding and reached petitioner's claims on the merits." Smith, 543 U.S. at 43, n.3.

[10] This Court also observed that the prosecution's admonition to the jury to "follow the law" supported its

could not be given adequate effect via the special issues: "just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Id.* at 48.

On remand, the CCA ordered the parties to submit supplemental briefing in light of this Court's summary reversal.[11] In its subsequent decision, a majority of the CCA held that the *Penry* error in his case was harmless. There are two components to the decision. First, the CCA concluded that petitioner had not properly preserved his individualization claim at trial – a decision that the court had refused to embrace, despite the urging of four concurring judges, in its opinion that was summarily reversed by this Court in *Smith v. Texas*. As a result, the CCA insisted that petitioner show "egregious" harm rather than "some" harm flowing from the Eighth Amendment violation. *Ex parte Smith*, 185 S.W.3d at 464.[12] Second, the CCA, proclaiming itself uncertain whether this Court necessarily decided that jurors were unable to give Smith's mitigating evidence adequate effect, examined whether, in the context of the trial, jurors were in fact precluded from giving effect to such evidence. The CCA concluded that Smith could not show "egregious" harm based on its view that Smith's mitigating evidence of cognitive impairment and abused background could have and were given significant effect via the special issues coupled with the nullification instruction. To reach this conclusion, the CCA emphasized

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conclusion that "the nullification instruction may have been more confusing for the jury to implement in practice than the state court assumed." *Smith*, 543 U.S. at 48, n.5.

[11] In its briefing, the state urged the CCA to impose the procedural bar that it had declined to impose in its decision that this Court summarily reversed, suggesting that "where the Texas Court of Criminal Appeals' decision is independently based on [a] state procedural ground, [the United States] Supreme Court lacks jurisdiction to review the matter." State's Brief on Remand at 3, attached as Appendix 10.

[12] In so doing, the Texas Court of Criminal Appeals did not hold that petitioner's constitutional claim was procedurally defaulted; rather, the court simply demanded a greater showing of actual harm as a predicate to relief.

that the nullification instruction was carefully explained to jurors on voir dire, *Ex parte Smith*, 185 S.W.3d. at 470, that the prosecution did not instruct jurors to ignore mitigating evidence during closing argument, *Id.* at 471, and that defense counsel made a moving plea that petitioner's life was "'worth saving.'" *Id.* at 472. In light of these considerations, the CCA declared that petitioner had failed to demonstrate that jurors were "unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take account the specific evidence of his relatively low I.Q. test at the age of thirteen, his participation in a special education reading program and speech therapy, or his troubled family background." *Id.* at 471-72. Accordingly, the CCA found no "egregious harm" not because petitioner lacked extensive mitigating evidence (or because such evidence would not have persuaded jurors to impose a life sentence). Rather, the CCA rejected this Court's conclusion that jurors could not give adequate effect to his acknowledged "extensive" mitigating evidence. *Id.* at 471.

Judge Holcomb dissented from the state court decision. Although he was one of the four judges who would have applied a procedural default to petitioner's claim in the decision reversed by this Court, *see Ex parte Smith*, 132 S.W. 3d at 428 (Holcomb, J., concurring), in his current dissent Judge Holcomb insisted that "the majority reasoning that Smith did not preserve error cannot be countenanced, and further, it is not supported by the record." *Ex parte Smith*, 185 S.W.3d at 474. In Judge Holcomb's view, petitioner's trial objections to the special issues "were clearly sufficient to apprise the trial court of his federal constitutional claim" and "the majority is merely splitting hairs to avoid applying the proper beyond-a-reasonable-doubt standard to his meritorious federal claim." *Id.* at 475. Moreover, in light of the fact that the

CCA had "already addressed the merits of Smith's claim twice," *id.* at 478, Judge Holcomb insisted that the CCA could not impose a procedural hurdle on remand that it had twice declined to impose: "Because our holding was reversed by a higher court, a court which addressed the merits and found our holding on the merits to be erroneous, we may not now . . . decide that the substantive complaint was not preserved." *Id.* In addition, Judge Holcomb rejected the majority's conclusion that the error in petitioner's case was harmless based on the majority's view that jurors in fact could have given adequate effect to petitioner's mitigating evidence. This conclusion, Judge Holcomb observed, "weave[s] into its harm analysis the disavowed conclusion that the two special issues submitted sufficiently encompassed Smith's mitigating evidence." *Id.* at 479. According to Judge Holcomb, "our judicial power does not include the power to . . . ignore orders from the Supreme Court." *Id.*

REASONS FOR GRANTING CERTIORARI

I. THE DECISION OF THE TEXAS COURT OF CRIMINAL APPEALS THREATENS THIS COURT'S AUTHORITATIVE ROLE IN CONSTRUING AND APPLYING FEDERAL CONSTITUTIONAL LAW.

This Court has limited resources to give guidance in constitutional adjudication, especially as to the operation of constitutional principles within individual state death penalty schemes. Over the past five years, this Court has spoken directly to the constitutional adequacy of the former Texas "special issue" scheme to permit consideration of mitigating evidence. *See Penry II*, 532 U.S. 782 (2001); *Tennard*, 542 U.S. 274 (2004); *Smith*, 543 U.S. 37 (2004). In all three opinions, including the one in this case, *Smith*, this Court has rejected efforts to ratify death

sentences in cases where jurors were unable to give appropriate weight to significant mitigating circumstances. This Court has repeatedly insisted that the Eighth Amendment requirement of individualized sentencing is satisfied only if jurors are able "to give *full* consideration and *full* effect to mitigating circumstances in choosing the defendant's appropriate sentence." *Smith*, 543 U.S. at 46 (italics in original) (internal quotation marks and citations omitted). This Court has also made clear that the former special issues do not afford such consideration for evidence, such as petitioner's, of limited intelligence, special education placement, and a difficult and deprived childhood. *Id.* at 48 ("just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented"). Finally, this Court has made clear, in *Penry II*, but especially in its decision in this case, that inviting jurors to falsely answer the special issues via a nullification instruction does not cure the failure of the special issues to afford full consideration of a defendant's mitigating evidence. "There is no principled distinction, for Eighth Amendment purposes, between the instruction given to petitioner's jury and the instruction in *Penry II*. Petitioner's evidence was relevant mitigation evidence for the jury under *Tennard* and *Penry I*. We therefore hold that the nullification instruction was constitutionally inadequate under *Penry II*." *Id.*

The decision below, though it purports to deny relief on the ground that the error this Court identified is "harmless," in fact directly challenges the core conclusions of this Court's opinion. Moreover, the decision of the court below to impose a high standard of harm on remand, based on a procedural determination that it resolved differently prior to the remand, is a

transparent effort to avoid the consequences of this Court's ruling on the merits. The imposition on remand of a procedural obstacle previously rejected amounts to a "bait and switch" manipulation of this Court's appellate jurisdiction. Having addressed the merits without a procedural obstacle prior to this Court's intervention, the CCA cannot now choose to impose that obstacle. The decision below represents a threat to this Court's constitutional authority, and this Court should grant certiorari in order to defend its prior ruling in this case and its status more broadly as the final arbiter of federal constitutional law.

A. The Purported Harm Analysis in the Decision Below Is Nothing More than Disagreement with this Court's Conclusion on the Merits that Petitioner's Mitigating Evidence Could Not Be Given Adequate Effect via the Special Issues as Supplemented by the Nullification Instruction.

In its decision below, the CCA pointed to a number of considerations to support its conclusion that the constitutional error in this case was harmless. First, the CCA insisted that jurors in fact understood the nullification instruction given in this case and "[o]verwhelmingly" indicated on voir dire that they could alter their truthful answers to achieve a life sentence. *Ex parte Smith*, 185 S.W.3d at 468. Second, the CCA found significant the fact that the prosecution "never suggested that applicant's mitigation evidence should be ignored." *Id.* at 471. Lastly, the CCA seemed to suggest that because defense counsel made a powerful argument that petitioner's life was "'worth saving,'" *id.* at 472, jurors must have been able to give effect to his mitigating evidence. Based on these three considerations, the court was unpersuaded "that the jury was unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take into account the specific evidence of his relatively low I.Q. test at the age of

thirteen, his participation in a special education reading program and speech therapy, or his troubled family background." *Id.* at 470.

It is striking that none of these considerations has anything to do with the weight or significance of petitioner's mitigating evidence. Indeed, the CCA explicitly recognizes that petitioner's mitigation – his low I.Q., involvement in special education, and abusive family background – was "extensive." Instead, each of the CCA's factors directly challenges this Court's conclusion on the merits that the special issues in combination with the nullification instruction provided an inadequate vehicle for juror consideration of petitioner's evidence.

The CCA's claim that the voir dire confirms jurors' ability to understand and act in accordance with the nullification instruction is precisely the argument this Court rejected in its summary reversal. In the opinion this Court reversed, the CCA emphasized that the nullification instruction by itself was sufficiently clear to inform jurors of their power to change their answers to the special issues if they believed that mitigating evidence. *Ex Parte Smith*, 132 S.W.3d at 416 ("The trial court's instructions clearly informed the jury that mitigation evidence 'trumped' the special issues."). This Court did not dispute the "clarity" of the nullification instruction or the ability of jurors to comprehend it. Instead, this Court insisted that a clear nullification instruction – well understood by jurors – might actually be worse because it "could possibly have intensified the dilemma faced by ethical jurors." *Smith*, 543 U.S. at 47-48. The problem is not simply that jurors were unable to understand the operation of the nullification instruction; rather, the nullification instruction required them to answer the special issues untruthfully in order to give effect to Smith's mitigating evidence. Accordingly, the *Penry* error identified by this Court

cannot be deemed less harmful because the voir dire confirms what this Court assumed: that the nullification instruction plainly told jurors to lie in order to give effect to mitigating evidence.

Moreover, this Court was well aware of the voir dire excerpts on which the opinion below rests when it declared the nullification instruction in this case constitutionally infirm. Those excerpts were quoted at length in Judge Hervey's concurring opinion. *See Ex Parte Smith*, 132 S.W.3d at 420-23. Judge Hervey, relying in part on these excerpts, ultimately voiced disagreement "with the United States Supreme Court that Texas jurors are incapable of remembering, understanding, and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case." *Id.* at 427 (using "*but see*" citation to *Penry II*). In the present opinion, Judge Hervey, concurring, joined by Judge Keasler, again voices this disagreement with *Penry II*, *Ex parte Smith*, 185 S.W.3d at 474 (stating that because the court is resting its judgment on harmless error grounds,[13] "we are not bound by the view, expressed in *Penry II* that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case") (citing her prior concurring opinion in *Ex Parte Smith*, 132 S.W.3d at 427). Judge Hervey also expresses disagreement with this Court's opinion in *Smith*, stating "that the Constitution requires only that a jury be provided with a vehicle to meaningfully consider

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[13] Justice Hervey's concurring opinion wrongly characterizes the application of harmless error analysis as an "independent state ground." The application of harmless error analysis to a constitutional violation is not an independent state ground, and this Court has routinely treated state courts' applications of harmless error to federal constitutional questions as themselves subject to federal review. *See, e.g., Chapman v. California*, 386 U.S. 18, 21 (1966) ("Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions mean, what they guarantee, and whether they have been denied."). Moreover, the majority opinion below nowhere endorses Justice Hervey's "independent state ground" characterization of its harmless error application.

mitigating evidence and not, as the Court's opinion seems to decide, a vehicle to 'fully and completely' consider mitigating evidence." *Ex parte Smith*, 185 S.W.3d at 473 (citation omitted).

Ultimately, then, the state court's argument that the nullification instruction given at Mr. Smith's trial was harmless is essentially an argument that this Court was wrong in holding "that the nullification instruction was constitutionally inadequate under *Penry II*." *Smith*, 543 U.S. at 48 (2004). In this respect, the state court decision conflates the contextual judgment involved in assessing whether a jury charge is constitutionally infirm with the contextual assessment appropriate to harmless error analysis. Under *Boyde v. California*, 494 U.S. 370, 381 (1990), courts must look at the context of the instruction "in the light of all that has taken place at the trial" to determine whether there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant mitigating evidence." *Id.* at 380. That sort of analysis is precisely what this Court undertook in *Smith*, looking at the special issues and nullification instruction in light of the circumstances of petitioner's trial. This Court found significant that the verdict form "made no mention whatsoever of mitigation evidence," *Smith*, 543 U.S. at 48, that the prosecutor "reminded the jury that each and every one of them had promised 'to follow the law' and return a 'Yes' answer to the special issues so long as the State met its burden of proof," *id.* at 48, n.5, and that the inquiries of the special issues "had little, if anything, to do with the mitigation evidence petitioner presented." *Id.* at 48. The state court's conclusion that the same voir dire excerpts before this Court when it found *Penry II* error now suggest that jurors could have given effect to

Smith's mitigating evidence is an attempt to repudiate this Court's decision on the merits.

Harmless error analysis, on the other hand, assumes that constitutional error has occurred and asks whether the mitigation evidence placed outside of jurors' consideration might have altered their decision to impose death. *See, e.g., Allen v. Lee*, 366 F.3d 319, 349 (4th Cir. 2004) (*en banc*) (Gregory, J., concurring) (harmless error focus after improper limitation on consideration of mitigating evidence is whether "the *totality* of the mitigation evidence" in light of the aggravating evidence might "have swayed at least one juror to spare [the defendant's] life").[14] Nowhere does the opinion below suggest that Smith's mitigating evidence was insufficient to influence the ultimate judgment of at least one juror, and such a conclusion could not possibly be sustained. Smith's evidence indicated that he had learning disabilities and speech handicaps at an early age (possible rooted in organic deficits), low intelligence, and an abusive family background. Mr. Smith's low intelligence, reflected in his 78 I.Q. score, by itself provided a basis for properly instructed jurors to conclude that he did not deserve to die. In conjunction with Mr. Smith's other mitigating evidence, such as his abusive family situation and the fact that he had only recently completed ninth grade at the time of the crime, Mr. Smith's

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[14] It is worth noting that this Court has never itself found an individualization claim harmless, though it has suggested that such claims are subject to harmless error review. *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) ("Respondent has made no attempt to argue that this error was harmless"). Other courts have been extraordinarily reluctant to find limitations on the consideration of mitigating evidence harmless. *See, e.g., State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426, 433 (N.C. 1990) (declaring that "it would be a rare case in which *McKoy* could be deemed harmless"); *see also State v. Fullwood*, 329 N.C. 233, 404 S.E.2d 842, 844 (1991) ("In light of the evidence adduced at trial, we cannot conclude . . . beyond a reasonable doubt that had . . . jurors been permitted, under proper instructions, to consider [the mitigating] circumstance, they nevertheless would have voted for the death penalty rather than life imprisonment.").

It remains an open question whether the type of individualization error this Court found here and in *Penry II* is likewise subject to harmless error analysis. The use of a nullification instruction affects the overall manner in which evidence is received or considered, in contrast to errors involving the erroneous inclusion or exclusion of particular pieces of evidence, as in *Arizona v. Fulminante*, 499 U.S. 279 (1991). Accordingly, this Court might well conclude that

mental deficits provided a compelling case for a sentence less than death. As a nineteen year old defendant with a 78 I.Q., Mr. Smith was clearly on the edge of categorical exclusion from the death penalty altogether based on his low intelligence and age. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2004). In combination, these mitigating factors together with his abusive family background and long-term placement in special education undoubtedly could have persuaded jurors to withhold the death penalty, and nothing in the purported "harmless error" analysis below suggests otherwise. Indeed, this Court has recently stated that evidence of an abusive background alone supports a reasonable probability of a life verdict in a capital case even in the context of a highly aggravated crime where jurors are likely persuaded of a defendant's future dangerousness. *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (because "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case," the state court decision rejecting prejudice as a result of counsel's ineffective assistance was objectively unreasonable).

Similarly, the argument that the constitutional error in this case was harmless because the prosecution "never suggested that the jury should ignore or fail to consider any of applicant's mitigation evidence," *Ex parte Smith*, 185 S.W.3d at 471, is an attack on this Court's merits analysis rather than a genuine harm analysis. The opinion below appears to suggest that jurors would in fact have been able to give effect to petitioner's evidence because they were not explicitly forbidden by the prosecution from doing so. First, this Court said the exact opposite –

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the use of nullification instructions in capital sentencing amounts to structural error requiring automatic reversal.

that the prosecution's remarks at closing argument encouraged jurors to confine themselves to the special issues and not to consider whether the defendant deserved to live or die; in particular, this Court's summary reversal found troublesome the prosecution's reminder to the jurors "that each and every one of them had promised to 'follow the law' and return a 'Yes' answer to the special issues so long as the State met its burden of proof." *Smith*, 543 U.S. at 48, n.5. From this Court's perspective, such a directive ran counter to the message of the nullification instruction, because it "intensified the dilemma faced by ethical jurors" who, believing that mitigating evidence justified a sentence less than death, also believed that the state had proved deliberateness and dangerousness. *Id.* at 48.

Second, the absence of additional prosecution comments to ignore mitigating evidence cannot render the constitutional error in this case harmless. This Court firmly and explicitly concluded that the special issues, coupled with the nullification instruction, did not allow jurors to afford "full consideration and full effect" to petitioner's mitigating evidence, and the fact that additional prosecutorial argument did not compound this error does not in any way suggest that petitioner's mitigating evidence was in fact adequately considered.

Finally, the CCA's argument that defense counsel powerfully argued for a sentence less than death is likewise an attack on this Court's conclusion that the special issues did not permit adequate consideration of petitioner's mitigating evidence. According to the opinion below, defense counsel spoke about petitioner's low I.Q. in his closing argument, spoke about his family problems, noted the "prodigious number" of defense witnesses, and indicated that petitioner's life was "worth saving." *Ex parte Smith*, 185 S.W.3d at 470. In light of this effective

punishment phase advocacy, the court was unpersuaded "that the jury was unable to consider the totality of his extensive mitigating evidence" and therefore that petitioner failed to establish the requisite harm. *Id.* at 471. But nowhere does the court below explain why strong advocacy regarding petitioner's mitigating evidence in any way lessened the error of the sentencing instructions which placed such evidence beyond the jurors' effective reach. As this Court concluded, the inquiries of the special issues "had little, if anything, to do with the mitigation petitioner presented." *Smith*, 543 U.S. at 48. The fact that defense counsel powerfully argued that petitioner's life was "worth saving" did not change the fact that the deliberateness and dangerousness questions did not allow jurors to express their view that petitioner's life should be saved. And the nullification instruction, which did invite consideration of mitigating evidence, did so in a manner that this Court explicitly rejected, because it required jurors to falsely answer the special issues to voice their endorsement of a life sentence. Again, instead of suggesting that petitioner's mitigating evidence was too flimsy to support a life sentence, the court below simply rejects this Court's conclusion that the sentencing instructions did not afford petitioner an adequate vehicle for considering his mitigating evidence. If fact, the lengthy description of petitioner's "extensive mitigating evidence," *Ex parte Smith*, 185 S.W.3d at 471, the "prodigious number of defense witnesses" who testified on his behalf, *id.* at 470, and defense counsel's "well-crafted closing argument" that petitioner's life was "worth saving," *id.*, at 472, all confirm that the error this Court identified cannot reasonably be dismissed as harmless.

B. *The Imposition of an 'Egregious Harm' Standard on Remand, Based on a Procedural Finding That the CCA Had Twice Refused to Adopt in this Case Prior to this Court's Summary Reversal, Constitutes an Impermissible Attempt to Evade the Consequences of this Court's Ruling on the Merits.*

The CCA twice addressed the merits of petitioner's *Penry* claim prior to this Court's summary reversal of its denial of relief. *See Smith v. State*, No. 71,333 (Tex. Crim. App. June 22, 1994), attached as Appendix 3; *Ex Parte Smith*, 132 S.W. 3d 407 (Tex. Crim. App. 2004), attached as Appendix 2. Accordingly, when this Court granted *certiorari* and addressed the merits of petitioner's claim, it did so without concerns about procedural obstacles. This Court expressly noted that although "[f]our judges would have found petitioner's claim procedurally defaulted," the "majority of the court, however, declined to adopt this holding and reached petitioner's claim on the merits." *Smith*, 543 U.S. at 43, n.3.

Now, after this Court rejected the CCA's conclusion on the merits, the CCA has chosen to penalize petitioner for the purported procedural default that it had previously declined to apply. Although the CCA does not hold petitioner's claim procedurally defaulted,[15] the CCA insists that petitioner must show "egregious harm" rather than "some harm" resulting from the constitutional violation. The imposition of a procedural hurdle on remand that the CCA previously rejected constitutes a manipulation of this Court's appellate jurisdiction. If state courts were free to reconsider procedural rulings after this Court's intervention, this Court would constantly be baited into announcing advisory opinions in contravention of the "case" or "controversy" requirements of Article III. Moreover, such a practice would afford state courts "two bites at the apple" to deny relief to federal claims, first on the merits and then, following

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[15] The majority does not impose a procedural default which would preclude altogether the entertaining of petitioner's claim, though the State's briefing on remand suggested this course of action to preclude further review by this Court. State's Brief on Remand at 3 ("where the Texas Court of Criminal Appeals' decision is independently based on [a] state procedural ground, [the United States] Supreme Court lacks jurisdiction to review the matter"), attached as Appendix 10.

reversal by this Court. on belatedly discovered or recognized procedural grounds.

This Court's precedents make clear that had the CCA purported to impose a full procedural default against petitioner's claim, such a default would not constitute an independent and adequate state ground of decision. *See, e.g., Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (holding that "state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review"); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 300-302 (1964) (irregularly applied state procedural rules do not constitute adequate state grounds of decision). Where a state declines to impose a procedural default twice in the same case, and then seeks to impose it for the first time after this Court grants relief, it can hardly be said that the state procedural rule is "strictly or regularly followed." *Barr*, 378 U.S. at 149. In *Ford v. Georgia*, 498 U.S. 411 (1991), the Georgia Supreme Court sought to impose a procedural default against the defendant's *Batson* claim after this Court had vacated and remanded the state court's decision denying defendant's claim of purposeful discrimination in jury selection. This Court acknowledged that the state court rule for preserving *Batson* error was "sensible," *id.*, at 422, but concluded that in the circumstances of the case, in which the state court had already entertained the merits of defendant's claim under *Swain v. Alabama*, 380 U.S. 202 (1965), the application of the procedural default ran afoul on the requirement that only a "'regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Ford*, 498 U.S. at 424 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)).

The state's effort to burden petitioner's claim based on the same facts that would plainly not

qualify as an enforceable independent and adequate state ground of decision denies the full effect of this Court's constitutional adjudication. Just as this Court has condemned the prospect of defense lawyers "sandbagging" by withholding constitutional claims only to assert them in a later proceeding, *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977), so too should this Court discourage state courts from withholding procedural objections to federal constitutional claims until after this Court has decisively rejected their adjudications on the merits. Not only do such untimely assertions of procedural default fail to satisfy the requirements for adequate state grounds, they are contrary to fundamental Due Process principles embedded in the doctrine of "law of the case." *See, e.g., Cohen v. Brown Univ.*, 101 F.3d 155, 167 (1st Cir. 1996) ("The law of the case doctrine precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided."); *U.S. v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) ("Under the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court, in the identical case.'") (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)).

Moreover, the basis for imposing a procedural burden in this case is extremely thin. According to the majority decision, petitioner failed to make an adequate objection to the nullification instruction. On its view, petitioner's timely claim that the special issues failed to permit full consideration of his mitigating evidence and his explicit invocation of *Penry I* was not adequate to preserve his constitutional claim because he did not separately object to the nullification instruction added to the charge. *Ex parte Smith*, 185 S.W.3d at 461 n.8. This purportedly "procedural" analysis itself reflects the CCA's misunderstanding of the applicable

federal substantive law. Petitioner's timely and appropriate objection to the special issue scheme rested on his view that those issues did not afford adequate consideration of his mitigating evidence. The CCA's opinions throughout this litigation emphasize that the added nullification instruction cured such error. See *Smith v. State*, No. 71,333 at 11; *Ex parte Smith*, 132 S.W.2d at 410-411; 417; *Ex parte Smith*, 185 S.W. 3d at 468, 471. This Court found both that the special issues were inadequate to permit adequate consideration of petitioner's mitigating evidence (because the focus of those issues "had little, if anything to do with the mitigation evidence petitioner presented," *Smith*, 543 U.S. at 48), and that the nullification instruction did not cure that fundamental error ("the nullification instruction was constitutionally inadequate under *Penry II*," 543 U.S. at 48). In short, the CCA wants to deny relief to petitioner on his claim under *Penry I* because he did not specifically anticipate and challenge the State's (and subsequently the CCA's) flawed response to his *Penry I* claim. This Court has long rejected state procedural arguments that elevate form over substance, especially where the trial court has fair notice of the nature of the defendant's constitutional objections. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (finding defense counsel's constitutional objections to the statute sufficient because the trial court plainly understood the nature of his objection in light of the "sequence of events"). In *Osborne*, this Court explicitly decried any requirement for defense counsel "to object a second time, specifically to the jury instructions" in a case where the basic underlying claim was clear, and noted that to insist on such a requirement "would force resort to an arid ritual of meaningless form . . . and would further no perceivable state interest." *Id.* at 124 (internal citations and quotation marks omitted).

Thus, the CCA violated the mandate of this Court's opinion by imposing an exceptionally high standard of harm on remand. Moreover, even if the CCA were authorized to impose its elevated standard, the constitutional error this Court identified undoubtedly caused petitioner "egregious harm" in foreclosing jurors' consideration of his low intelligence, abusive family life, and special education placement, especially in light of petitioner's age (19) and immaturity (9th grade) at the time of the offense.

CONCLUSION

For these reasons, this Court should grant certiorari to ensure compliance with its prior decision in this case and to preserve its role as the final arbiter of federal constitutional meaning. Because of the unusual posture of this case and this Court's recent extensive efforts to clarify the Eighth Amendment rights at stake in the Texas capital sentencing context, this Court should issue a summary decision reversing the decision of the CCA. In the alternative, this Court should grant certiorari and schedule this case for briefing and oral argument.

Respectfully submitted,

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No. 05-11304

IN THE
SUPREME COURT OF THE UNITED STATES

LAROYCE LATHAIR SMITH,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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To the Honorable Justices of the Supreme Court of the United States:

A jury convicted petitioner LaRoyce Lathair Smith and sentenced him to death for the torture and murder of Jennifer Soto. In the instant petition for certiorari review, Smith claims that a state habeas court may not use a state harm analysis to deny relief for jury charge error based on *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*"). Petition at 15-29. He suggests a federal harm analysis would be more appropriate.

There is no compelling reason to grant review in this case because Smith can obtain the federal harm analysis he desires in federal habeas court. This Court also lacks jurisdiction because Smith raises his complaints about the Texas harm standard for the first time in this Court. And because the Texas harm standard is more protective of Smith that the federal harm analysis, it is an adequate and independent state ground that precludes review. Finally, Smith's claims lack merit because the state court's harm analysis was consistent with its prior treatment of his claims and was properly executed under state law. This Court should deny certiorari review.

STATEMENT OF THE CASE

I. Trial Evidence

The following facts are extracted from the Texas Court of Criminal Appeals' ("CCA") opinion on remand:

> The State's evidence showed that Jennifer Soto was a 19-year-old girl who worked at Taco Bell. She was a hard worker and had been promoted to shift manager two weeks before her death. Applicant had worked at Taco Bell with her. On the evening of January 7, 1991, she was "closing manager" and Travis Brown was working with her. He was waiting for her to finish her office paperwork because she was going to give him a ride home.

Meanwhile, Nickles Lewis and two other friends came to applicant's house. Applicant told them that he was going to rob Taco Bell because he needed "some money for court." The four youths left applicant's house on foot, but they were soon picked up by Kevin Shaw and one of Shaw's friends who were riding around in Shaw's car. They stopped at another house so applicant could get a gun, and applicant said, "We're going to hit T.B." Applicant knew Jennifer would be working that night. He told one of his cohorts, "If she sees my face, I will have to kill her."

Kevin Shaw parked the car containing the six youths across the street from the Taco Bell. Applicant, Kevin Shaw, and a third member of the group, Devario Smith, got out of the car and paced outside the Taco Bell, waiting for Jennifer to come out of the back door. They waited 45 minutes, but she did not come out. When "things didn't go right," they all got back into the car and started to leave, but applicant said, "No, man, it got to be done. It got to be done." They turned around and went back.

At about 11:30 p.m., applicant knocked on the front door and asked to use the phone because his car had broken down. Travis, without opening the door, said that the Taco Bell was closed and that applicant could not come in. Applicant then asked to see Jennifer and when she came to the door, he repeated his request. Jennifer opened the door partway and applicant hugged her as he, Kevin, and Devario went inside. She showed applicant the telephone and went back to the office to finish up her paperwork while applicant's two companions stayed in the front with Travis.

After he pretended to finish his telephone call, applicant came back to the front and told Travis that "they were going to rob the place." Kevin told Travis, "If you keep your mouth shut, you'll get a cut of the money." Applicant went back, by himself, into the office where Jennifer was working.

Shortly thereafter, Travis heard yelling. When he went to investigate, he saw applicant holding Jennifer in a headlock. He was "pistol-whipping" her on the head with the butt of a gun. He kept hitting her until the gun's handle fell off. Applicant demanded the combination of the safe, but Jennifer screamed, "Call Tina, call Tina." She did not know the combination. Travis saw applicant step back, point the gun at Jennifer's back and shoot her at point blank range. She cried, "God, please don't let me die."

Applicant then went into the kitchen area, grabbed a butcher knife, and

> came back to Jennifer, continuing to demand the combination. He stabbed her underneath the left breast to make her tell him the combination, but when she did not give him the information he wanted, he stabbed her in the thigh, then the abdomen, then the head. The State characterized these as "torture type wounds." Finally, he sliced her neck, severing the jugular vein. Both the gunshot and the neck wound were fatal.
>
> Applicant, still carrying the bloody knife, walked out to the front. Travis jumped out of the way, saying "Hey, I don't know your face. I've never seen you. I don't know anything." Applicant replied, "Hey, I know your face and I'll kill you." After applicant and his two cohorts left, Travis called 911.

Ex parte Smith, 185 S.W.3d 455, 457-461 (Tex. Crim. App. 2006) (Appendix 1 to Smith's Petition, p. 4-5).

Smith testified on his own behalf. He admitted he knew Jennifer, liked her, and thought that "no one should die the way she died." Smith's Appendix 1, p. 5. According to Smith, all of the State's witnesses lied about the offense, including his friends who were with him that night. He contended that he was a Good Samaritan who tried to save Jennifer by grabbing the knife away from Kevin, the real murderer. Smith's Appendix 1, p. 5.

Smith was convicted of capital murder on June 14, 1991 for murdering Jennifer Soto during the course of committing or attempting to commit robbery. CR 3, 108, 121-22.[1] The following is a summary of the State's punishment evidence:

> [T]e State offered evidence that, two days after murdering Jennifer, applicant had physically assaulted Chris Standmier, the former boyfriend of

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[1] "CR" refers to the Clerk's Record of pleadings and documents filed with the court during trial, followed by page numbers. "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by volume number and followed by page numbers.

applicant's then-current girlfriend. Chris testified that he was home for the Christmas holidays from Prairie View University. He was standing in his mother's apartment parking lot when two cars pulled up. Applicant got out of one of them, took out a baseball bat and proceeded to beat Chris with it. Applicant hit Chris so hard that the bat broke in two. As Chris lay on the ground, applicant went back to the car, pulled out a Tech 9 pistol from the car, cocked it and told Chris, "N, get back from me. I'm going to kill you. I'll kill you." Chris said, "You got me." Then applicant got back into the car and they drove off. Chris went to the hospital.

The State also offered evidence that two months before the capital murder, officers arrested applicant on outstanding warrants as he was walking down the middle of the street in a high-crime area. While booking him into the jail, officers found ten ziplock baggies of crack cocaine in his underwear.

Several of applicant's teachers testified about applicant's conduct in school. One teacher, who taught applicant economics and math, testified that applicant was "taunting" in class and used abrasive, obscene language. He was sometimes mean and sometimes "docile." This high school teacher said that applicant seemed "threatening"-as if he would hurt the teacher-when he insisted that the teacher give him a passing grade in economics. The teacher was scared, in part because he was positive that applicant had earlier stolen his car's tires and rims.

Applicant's middle school vice-principal testified that he had suspended applicant from school for disruptive behavior in the classroom, possible weapons violations, throwing objects at teachers, and profanity. He had a bad reputation for peaceful and law-abiding activity and for respect toward authority.

A Dallas police officer, a member of the Youth Division at applicant's high school, testified that he found a Tech 9 in a locker shared by applicant and Nickles Lewis. Nickles told the officer that the gun was his, but applicant had five bullets in a bag he was carrying at the time. The officer thought applicant had a gun also, but he was unable to find it.

Smith's Appendix 1, p. 5-6. Smith called nineteen witnesses during his punishment case:

Fifteen of those were character witnesses. Applicant's middle school assistant principal testified that he had "8,000 problems at school, but applicant wasn't one of them," because he did not recall applicant. A pastor said that applicant's family attends church, and applicant always came with

his mother. "He's always been an impressive young man." He showed respect to the people at church and to his mother. When the pastor visited applicant in jail he showed remorse for Jennifer's death: he began to cry and said, "I saw her body." He thought applicant was capable of rehabilitation. The pastor said that he was aware that applicant's father stole from the family to support his crack habit. He said that such things have an adverse effect upon children: "Family troubles definitely affect the children." Although the pastor had never been to applicant's home and had never counseled applicant personally, he did not think that applicant would be a future danger to society.

The custodian of records for the special education department of the Dallas ISD testified that applicant's records showed that he could not read or do numbers in kindergarten. According to his kindergarten teacher, applicant "is a little rough, but enjoys his friends; he must be kept separate from a few because he's easily led into trouble." At the age of ten, applicant was diagnosed as learning disabled with a speech handicap. He was put into a special education reading group and given speech therapy. According to these school records, when he was eleven in 1982, applicant was implicated in numerous thefts at school, particularly of the speech clinician's purse. School contact with the parent indicated that LaRoyce has also been believed to be stealing at home. . . . Family stresses are reported. LaRoyce's behavior in class is exemplary and it has shocked school personnel that LaRoyce has been involved in stealing. He has admitted to theft and has cried when questioned about misbehavior.

At the age of thirteen, his WISC-R I.Q. testing showed a verbal I.Q. of 75, performance I.Q. of 84, and a full scale I.Q. of 78. At the end of 1986, applicant was phased out of the special education reading program because he then performed at grade level.

A high school classmate and football player testified that applicant once came to his rescue when a group from another high school "jumped him" and stabbed him. He thanked applicant, who said, "That's what friends are for."

Applicant's fiancee, the mother of his child, testified that applicant is not violent. Applicant would advise her sisters about doing their homework and not to make mistakes like he did. "Don't do what I did, you know, and slack off." According to her, applicant "just got with the wrong people, that's all." According to the fiancee's mother, applicant acted like a surrogate father to his younger sister. "He appeared to try to guide her and keep her aware of

society, people, boys, and things, and help her select appropriate young men friends." He is "a person who has been taught right from wrong and who respects society and respects people." He has an "average" intelligence and "is a person who has an intelligence capable of understanding and learning."

Applicant's best friend testified that he had not seen applicant be abusive to women. Applicant's brother, Myron, worked for UPS. He testified that when applicant's father went off on his motorcycle and used crack, Myron acted as a father figure to applicant. Applicant's mother brought her VCR, TV, microwave, and Tupperware over to Myron's house so applicant's father couldn't steal them and sell them for drugs. The family problems "affected" applicant, but Myron did not elaborate on the effect of these problems. A friend of applicant's mother testified that the father's drug habits affected the family because his mother had to act as both parents and she had "to pay the bill if we go out to eat like we used to." A legal assistant and student at UT-Arlington thought applicant was "a big loveable teddy bear" who had a lot to contribute to society because "he is willing to help people." A 69-year-old former neighbor testified that applicant "has been a good neighbor" and played with his grandchildren. A woman who had dated applicant's older brother testified that when she had a young baby and no income, applicant invited them to stay at his house. He let her use his bedroom with its queen-sized waterbed while he slept on the living room sofa. Applicant told her that because of his father's drug habit, he had to be the man of the house, so he went out and got a job at age fifteen or sixteen. The mother of one of applicant's former girlfriend's testified that she never had a problem with applicant; he was a fun person, always kidding around. He brought her a corn plant and a couple of ivy plants; he bought her some mirrors. Another friend testified that applicant is a nice young man: "He's the type I wouldn't mind having for a son." He was never disrespectful or violent.

Applicant's mother testified that she thinks applicant still has worth and value as a human being. Applicant "is a good child. He was a slow learner, but he's worthwhile. There's no way [applicant] would have hurt Jennifer. He was too crazy about Jennifer. She was a good and decent child. I'm so sorry for [her] family." Applicant's mother knew that applicant "would never hurt nobody."

In rebuttal, the State called a different middle-school assistant principal who testified that he had received numerous disciplinary referrals about applicant. One of them read, "LaRoyce talks out in class daily. He laughs

> out loud, plays around, and disrupts class daily. I cannot tolerate him." Applicant told a different teacher, "I'm going to kick your ass." Another of applicant's high school teachers testified that he had applicant in his pre-Algebra and physical-science class. "In one class, he called me a mf 7 times in one 55 minute period. On two occasions he tried to kill me. On one occasion he was going to put a bullet in my mf-ing head." Applicant was taken out of this teacher's class after about six weeks: "He would come in with no books, no preparation, never do any work, and sit sideways in the seat and just act like a little portent of evil. . . . He was always a big-time problem. It was a constant conflict."

Smith's Appendix 1, p. 6-7 (footnote omitted).

Smith was sentenced to death based on the jury's answers to two punishment issues. CR 120-23. As discussed previously by this Court, the jury received two questions in the punishment charge regarding deliberateness and future dangerousness. *Smith v. Texas*, 543 U.S. 37, 39 n.1 (2004). Under Texas law, affirmative answers to the two questions would result in a death sentence, and a negative answer to either one of the questions would result in a life sentence. In an attempt to comply with this Court's directive in *Penry v. Texas*, 492 U.S. 302 (1989) ("*Penry I*"), the trial court then gave the jury a supplemental "nullification" instruction. Smith's Appendix 4. The nullification instruction directed the jury to change a "yes" answer to "no" if they heard any mitigating evidence that bore no relationship to the punishment issues yet led them to believe that Smith should not be sentenced to death. *Smith*, 543 U.S. at 40.

II. Voir Dire

Each and every person who served on the jury in this case was told that a death sentence required "yes" answers to all of the special issues and that one "no" answer

would result in a life sentence.[2] During voir dire examination, the lawyers and the trial court went to great lengths at voir dire to explain the nullification instruction to the jurors, calling it an "escape valve" for giving the defendant a life sentence and providing examples of the type of mitigating evidence it contemplated, such as mental retardation, mental illness, an abusive childhood, or a drug or alcohol problem.[3] *Each and every person who served on the jury in this case stated he or she understood how to use the mitigation charge and would change a "yes" answer to "no" if the mitigation evidence warranted a life sentence.*[4] Thus, the jurors knew exactly how to give a life sentence to Smith if they had wanted to do so, and they all agreed they would do it under the appropriate circumstances.

Furthermore, in his closing argument, defense counsel reminded the jury:

> I want to talk to you about mitigating evidence. Mitigating evidence is that evidence that reduces the defendant's personal or moral culpability and may include, but is not limited to, any aspect of his character, record, background, or circumstances of the offense. It may go to one of the special

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[2] *See* 6RR 117-18 (Gary Powell, Juror No. 1); 8RR 102 (Ava Meyer, Juror No. 2); 10RR 106 (Donna Coulter, Juror No. 3); 11RR 48 (Carol Keyte, Juror No. 4); 11RR 141, 160-61 (Thomas Morrison, Juror No. 5); 13RR 31-32 (Dottie Wright, Juror No. 6); 15RR 7 (Teresa Lane, Juror No. 7); 16RR 5 (Steven Dillow, Juror No. 8); 16RR 65 (Janis Zeigler, Juror No. 9); 20RR 176 (Lynn Bartholomew, Juror No. 10); 21RR 43 (Mary Foote, Juror No. 11); 25RR 99 (Derek Fisher, Juror No. 12).

[3] *See, e.g.*, 8RR 129-30; 10RR 117, 131; 11RR 161-62; 13RR 65; 15RR 20-21; 16RR 17, 70-71; 20RR 187-88; 21RR 53; 25RR 105-06.

[4] *See* 6RR 149-53 (Gary Powell, Juror No. 1); 8RR 112-13, 133-34 (Ava Meyer, Juror No. 2); 10RR 118, 136-37 (Donna Coulter, Juror No. 3); 11RR 60 (Carol Keyte, Juror No. 4); 11RR 162-65 (Thomas Morrison, Juror No. 5); 13RR 66-67 (Dottie Wright, Juror No. 6); 15RR 31-32 (Teresa Lane, Juror No. 7); 16RR 18-19 (Steven Dillow, Juror No. 8); 16RR 70-71 (Janis Zeigler, Juror No. 9); 20RR 187-89, 204-06 (Lynn Bartholomew, Juror No. 10); 21RR 53-54 (Mary Foote, Juror No. 11); 25RR 105-07 (Derek Fisher, Juror No. 12).

> issues, it may not, but the Court tells you — and that the State has a burden — *that if you think that he should not die, you are to put "no" in one of the spaces* . . . .

(33RR 55-56) (emphasis added). Defense counsel then identified the mitigation evidence for the jury's consideration, specifically, the evidence of Smith's low intellect and difficult family life that was of special concern to this Court. (33RR 56-58); *Smith*, 543 U.S. at 41. Defense counsel later reminded the jury that the State had to prove beyond a reasonable doubt that the death sentence should be imposed despite mitigation evidence and said, "You shall answer 'no' to one of the issues to give effect to your meaning." (33RR 69). Thus, defense counsel's closing comments reminded the jury how to give mitigating effect to the exact evidence identified in this Court's per curiam opinion.

Accordingly, the theoretical concern expressed by this Court over nullification charges in general is unwarranted in this particular case. The record supports the conclusion that each and every juror knew how to give a life sentence and would have given a life sentence if they believed Smith's mitigation evidence warranted one. Any other conclusion would be based on speculation rather than evidence in the record.

II. Direct Appeal and Postconviction Proceedings

On direct appeal, Smith challenged the Texas death penalty statute on the ground that it provided no effective vehicle for the jury to apply mitigating evidence. State's Appendix 1, p. 29. Holding that the supplemental nullification instruction in the court's charge cured any insufficiency in the statute, the CCA affirmed Smith's conviction and sentence on June 22, 1994. *Smith v. State*, No. 71,333 (Tex. Crim. App. June 22, 1994) (not designated for publication) (Smith's Appendix 3, p. 10). This Court denied certiorari

review. *Smith v. Texas*, 514 U.S. 1112 (1995).

Smith next sought state collateral review, but his application was dismissed as untimely filed. *Ex parte Smith*, 977 S.W.2d 610 (Tex. Crim. App. 1998); State's Appendix 2. This Court again declined to issue a writ of certiorari. *Smith v. Texas*, 525 U.S. 1148 (1999).

Smith next filed a petition for postconviction relief in the United States District Court for the Northern District of Texas. This proceeding was ultimately dismissed without prejudice so that Smith could return to state court pursuant to newly enacted procedures for untimely applications. *Smith v. Johnson*, No. 3:98-CV-1778 (N.D. Tex. 1999); TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4A (West 1999). Smith's second state habeas application challenged, for the first time, the trial court's charge and the nullification instruction in particular. State's Appendix 3, p. 190. The CCA denied Smith's claim on its merits on April 21, 2004. *Ex parte Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004) (Smith's Appendix 2, p. 4-10).

This Court granted a writ of certiorari, reversed the CCA's decision per curiam, and remanded the case back to that court. *Smith*, 543 U.S. 37. The CCA carefully applied this Court's *Penry* jurisprudence to Smith's benefit and then presumed the jury could not "fully" consider Smith's evidence under the statutory issues. The CCA then conducted an exhaustive review of the record for harm under state law and denied relief. Smith's Appendix 1. The instant petition for certiorari review followed.

ARGUMENT

I. The Opinions

Smith bases his petition on the incorrect assertion that the CCA's opinion on remand "rejected this Court's [per curiam] conclusion" that the jurors could not give

adequate effect to his mitigating evidence through the statutory punishment issues. Petition, p. 14. This Court's per curiam opinion made no such conclusion. The CCA's analysis on remand was, in fact, authorized by this Court's reversal and properly executed.

A. The CCA's Original Habeas Opinion

The CCA's original habeas opinion contained three alternative holdings that were independently sufficient to deny habeas relief. Smith's Appendix 2. The majority first concluded that (1) Smith did not show evidence of a severe and permanent handicap, not of his own making, which is at least related to the offense (the Fifth Circuit "screening test"), (2) Smith did not show that the disability evidence was beyond the reach of the two special issues, deliberateness and future dangerousness, and (3) the nullification instruction in this case was sufficient to accord full weight to Smith's mitigation evidence. Smith's Appendix 2, p. 4, 6, 9.

B. This Court's Per Curiam Opinion

In its per curiam opinion, this Court first held that the CCA improperly assessed Smith's claim using the Fifth Circuit's screening test, which this Court had recently disavowed in *Tennard v. Dretke*, 542 U.S. 274 (2004). This Court did not address the CCA's holding that the two statutory punishment issues were sufficient vehicles for the jury to give effect to Smith's mitigating evidence. Instead, it Court skipped to the question of whether the nullification instruction in this case could overcome the problems of the nullification instruction it recently struck down in *Penry II. Smith*, 543 U.S. at 45.

This omission in the analysis is evident in the following transition found at the end of section II of the opinion: "Because petitioner's proffered evidence was relevant, the Eighth Amendment required the trial court to empower the jury with a vehicle capable of giving effect to that evidence. Whether the 'nullification instruction' satisfied that charge is the question to which we now turn." *Id.* In light of this language, the Court clearly did not purport to analyze whether the statutory instructions were infirm under *Penry I*. Moreover, a conclusion that the statutory issues were constitutionally deficient was not necessary for this Court to reverse the CCA, since the CCA's reliance on the Fifth Circuit screening test was justification alone for reversal.

To support his argument to the contrary, Smith relies on a single conclusory remark in the per curiam opinion that "Just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Smith*, 543 U.S. at 48. This remark suggests the statutory issues may be insufficient if an analysis were made, but the remark is not supported by any *Penry I* analysis or a cite to case law. *Compare Penry I*, 492 U.S. at 322-26 (discussing whether text of special issues allowed jury to give mitigating effect to Penry's evidence). In *Boyde v. California*, this Court held that the legal standard for reviewing ambiguous jury instructions is whether there is a "reasonable likelihood" that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. *Boyde v. California*, 494 U.S. 370, 380 (1990).

The Court's remark that the punishment issues had "little, if anything," to do with Smith's evidence does not reference any legal standard, either *Penry I* or *Boyde*. Thus, it appears that this Court left open the possibility—and based on the weak mitigation evidence[5]—the very real probability, that the statutory issues were constitutionally sufficient and that the nullification instruction, though erroneous, was a gratuitous

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[5] Smith exaggerates his mitigation evidence in this case. For example, Smith's conclusion that his age and IQ score place him "clearly on the edge of categorical exclusion from the death penalty altogether" is patently false. Petition, p. 22. Smith was about three months short of his twentieth birthday when he murdered Soto, placing him well above the age of categorical exclusion from the death penalty. *See* State's Trial Ex. 75 (DISD records showing date of birth as 4-23-1971).

Moreover, a score of 78 on the WISC-R represents a "true" IQ of between 73 and 83, given the standard error of measurement that accompanies IQ tests. *See Clark v. Quarterman*, No. 05-70008, slip op. at *7-9, 2006 U.S App. LEXIS 18290 (5th Cir. July 20, 2006) (not yet reported). These scores are well within the range of borderline intellectual functioning, a diagnostic category described in the DSM-IV-TR as having an IQ of 71-84. Borderline intellectual functioning is not considered a mental disorder. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 731, 740 (4th ed. 2000). Further, mental retardation is not assessed based on IQ scores alone. An assessment of adaptive skills is required before a person can claim such a diagnosis. *Ex parte Briseno*, 135 S.W.3d 1, 7-8 (Tex. Crim. App. 2004). To date, Smith has made no such claim.

Likewise, Smith's repeated characterization of his family life as "abusive" and his analogy to *Williams v. Taylor* is disingenuous. *Williams v. Taylor*, 529 U.S. 362, 398 (2000); Petition, p. 22, 29. The facts in *Williams* are readily distinguishable.

In *Williams*, the evidence showed a "nightmarish childhood." Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, Williams had been severely and repeatedly beaten by his father, he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody. *Id.* at 415 (O'Connor, J., concurring).

The evidence in this case that Smith's father stole from the family to support a drug habit, forcing Smith to get a part-time job at the age of 15 or 16, hardly rises to the "nightmarish" abuse described in *Williams*. Smith's family situation can be categorized as a "troubled childhood" at best. Smith's Appendix 1, p. 12, n.33.

measure taken by the trial court to be "safe" rather than "sorry" at a time when the law was uncertain.

C. The CCA's Opinion on Remand

Thus, on remand, the CCA was permitted, even obligated, to re-examine the issue of whether Smith's mitigation evidence was fully encompassed within the statutory issues, especially given the fact that it had used the improper screening test in its original opinion. Smith's Appendix 1, p. 10. Relying on factors that Texas courts use to assess the sufficiency of the evidence to support a jury's finding of future dangerousness, the CCA concluded that all of Smith's mitigating evidence was likely relevant to the future dangerousness special issue. Smith's Appendix 1, p. 10-11 (citing *Keeton v. State*, 724 S.W.2d 58 (Tex. Crim. App. 1987)).[6] Indeed, Smith himself used the "*Keeton* factors" on direct appeal to argue that his mitigating evidence (the same evidence he now contends the jury had no vehicle to consider) rendered the evidence insufficient to support the

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[6] The CCA reasoned that if Smith's mitigating evidence fit within the *Keeton* factors and was relevant to assessing the legal sufficiency of the evidence to support the jury's future dangerousness finding, then it logically followed that such evidence was encompassed under the future dangerousness punishment issue. The *Keeton* factors that Texas considers to be relevant to future dangerousness are:

> (1) the circumstances of the capital offense, including the defendant's state of mind and whether he was working alone or with other parties;
> (2) the calculated nature of the defendant's acts;
> (3) the forethought and deliberateness exhibited by the crime's execution;
> (4) the existence of a prior criminal record, and the severity of the prior crimes;
> (5) the defendant's age and personal circumstances at the time of the offense;
> (6) whether the defendant was acting under duress or the domination of another at the time of the offense;
> (7) psychiatric evidence; and
> (8) character evidence.

Keeton, 724 S.W.2d at 61.

jury's answer to the future dangerousness issue. State's Appendix 1, p. 23-29. So even Smith believes (at least when it operates to his benefit) that his mitigation evidence fits within the future dangerousness issue.

Nevertheless, the CCA did not rest its judgment on the conclusion that the statutory special issues were sufficient in this case. Given its uncertainty regarding this Court's *Penry II* jurisprudence, the CCA assumed for purposes of argument that some portion of Smith's evidence of limited mental ability was outside the ambit of the special issues.[7] Smith's Appendix 1, p. 12. Having assumed error, the CCA went on to conduct a harmless error review.

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[7] The CCA's uncertainty stems from the issue of whether a charge must allow a jury to give mitigating evidence "full" effect and consideration or "meaningful" effect and consideration. Smith's Appendix 1, p. 12-13, n.36. Smith's assertion that this Court has "repeatedly insisted" the Eighth Amendment requires "full" consideration and effect is not supported in law. Petition, p. 16.

The "*full* consideration" language in this Court's per curiam opinion is quoted directly from Justice O'Connor's dissent in *Johnson*, as quoted in *Penry II*. *Smith*, 543 U.S. at 38, 46 (quoting *Penry II*, 532 U.S. at 979 (quoting *Johnson v. Texas*, 509 U.S. 350, 381 (1993)). This language is merely *dicta*, because it would otherwise overrule *Jurek*, and this Court previously has held that no such "sea change" occurred in light of *Penry I*. *Graham v. Collins*, 506 U.S. 461, 474 (1993); *see also Coble v. Dretke*, 444 F.3d 345, 358 (5th Cir. 2006) (quoting *Bigby v. Dretke*, 402 F.3d 551, 570 (5th Cir. 2005)) ("The Supreme Court's rulings in *Penry II* and *Smith* should not be read to disturb its earlier holdings affirming the constitutionality of Texas'[s] statutory death penalty sentencing scheme"); *Tennard v. Dretke*, 442 F.3d 240, 253 n.17 (5th Cir. 2006) (declining to interpret *Smith* and *Tennard* as new rules); *Cole v. Dretke*, 418 F.3d 494, 508 (5th Cir. 2005) ("Neither *Tennard* nor *Smith* changes *Johnson*'s analysis of *Penry*"); *In re Kunkle*, 398 F.3d 683, 685 (5th Cir. 2005) (*per curiam*) ("We are not persuaded that the Court intended to undercut *Jurek*, *Graham*, and *Johnson* without even citing them. Whether ... *Smith* sweep[s] so broadly as to create a conflict with its own *Jurek* or *Graham* decisions is for the Supreme Court").

This Court has recognized that, in most cases, the former special issues remain constitutional because they "allow consideration of particularized mitigating factors." *Jurek*, 428 U.S. at 272-73. The fact that mitigating evidence might have "some arguable relevance beyond the special issues" is immaterial because "virtually any mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the

The CCA's tentative conclusion that the statutory issues sufficiently embraced Smith's mitigation evidence did not violate any prior holding of this Court. As stated above, this Court's per curiam opinion made no analysis regarding the sufficiency of the statutory issues as a vehicle for the jury's consideration of Smith's evidence. In most cases, the former special issues remain constitutional because they "allow consideration of particularized mitigating factors." *See Jurek v. Texas*, 428 U.S. 262, 272-73 (1976). Further, the CCA *assumed*, for Smith's benefit, that his evidence was partially outside the ambit of the special issues. Smith's Appendix 1, p. 12. Having assumed the error, the CCA cannot be said to have rejected any holding by this Court.

The CCA went on to conduct a harm analysis that Texas courts regularly employ for jury charge error. *See Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984) (op. on reh'g). Under *Almanza*, the level of harm required for reversal depends on whether a timely objection was made at trial. If a defendant timely objected, he must only show "some harm" for reversal; if he did not, he must show "egregious harm." *Almanza*, 686 S.W.2d at 171. A defendant meets his burden to show "egregious harm" if a review of the record as a whole shows that he did not have "a fair and impartial trial." Smith's

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Texas special issues." *Graham*, 506 U.S. at 476 (citing *Franklin v. Lynaugh*, 487 U.S. 164, 190 (1988) (Stevens, J., dissenting)) (emphasis in *Graham*). To demonstrate Eighth Amendment error, there must exist more than "the mere possibility" that the jury was prevented from giving effect to mitigating evidence. *Johnson*, 509 U.S. at 367.

Thus, the "full consideration" rule suggested in this Court's per curiam opinion flies in the face of this valid and binding precedent.

Appendix 1, p. 10. Here, after considering voir dire, the evidence adduced at guilt, including Smith's own testimony, and closing arguments, the CCA was unable to conclude that the statutory special issues and the nullification instruction caused Smith egregious harm in their effect on the jury's deliberation. Smith's Appendix 1, p. 17.

II. There is no compelling reason to grant review in this case.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2005). Smith claims this Court must protect its constitutional authority and defend its prior ruling in this case. But Smith no longer contends, as he did in the CCA, that *Penry II* error is structural or that his conviction should be automatically reversed; he only suggests in a footnote this might be the case. Petition, p. 21, n. 14.

Before this Court, he criticizes the "egregious harm" standard regularly used in Texas for unobjected-to charge error. He suggests a "genuine" (i.e., federal) harmless error standard would be more appropriate. Petition, p. 21-22. The proper venue for obtaining the federal harmless error analysis he desires is not this Court, but the federal habeas courts.

On this point, Justice Stevens has noted that:

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring). Thus, federal habeas court is "the more appropriate avenue" for litigation of the instant claims. There is no compelling reason for this Court to grant review at this time.

III. Smith may not raise claims for the first time in a petition for certiorari.

As a general rule, arguments cannot be presented for the first time to this Court on review. *Beck v. Washington*, 369 U.S. 541, 550-554 (1962). This requirement is jurisdictional. *See Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919). Smith seeks to present for the first time his argument that the CCA applied the wrong harmless error analysis in this case.

In his brief to the CCA below, Smith argued that this case was not amenable to a harmless error analysis. State's Appendix 4, p. 8-9. He argued that the decisions of this Court, of the Fifth Circuit Court of Appeals, and of the CCA all confirm that *Penry II* error mandates relief without a consideration of harm. He concluded parenthetically, and in the alternative, that he was, in fact, harmed because a jury properly charged "surely could have concluded that he did not deserve to die." State's Appendix 4. In his reply brief on remand, Smith argued against a finding of procedural default and took issue with the State's interpretation of this Court's per curiam reversal. State's Appendix 5.

Nowhere in the record or history of this case, except in the petition for certiorari, does Smith argue that the harmless error standard regularly applied by Texas courts to jury charge error is inappropriate for *Penry II* error. Smith's point on certiorari is clear: he claims the Texas "egregious harm" standard is improper because, unlike the federal

harm standard, it does not seek to determine whether the error affected the jury's *verdict*; it "merely" seeks to determine whether the defendant had a fair and impartial trial. Ironically, the Texas egregious harm standard is less onerous to Smith in this regard than the federal analysis Smith would have this Court apply. In any event, Smith asserts that the *Almanza* egregious harm analysis is merely a rehashing of the constitutional error analysis in disguise and a subversive attempt to apply a rule of procedural default. However unsupportable these positions are in reality, they were never raised before now. Accordingly, Smith's complaints about the Texas harmless error rule are not properly before this Court.

IV. Texas's more protective harm analysis is an adequate and independent state ground that precludes review.

Furthermore, it is at least arguable that the CCA's application of a state harm analysis is an adequate and independent state ground that precludes review by this Court. The CCA considered which harmless error review would apply to unobjected-to constitutional jury charge error. Smith's Appendix 1, p. 13-14, n.38. The CCA considered applying the federal harm analysis in *Chapman v. California*, 386 U.S. 18 (1967), but concluded that *Chapman* requires compliance with the state's procedural rule for preserving error. Smith's Appendix 1, p. 14, n.38; *Chapman*, 386 U.S. at 21. Because Smith did not complain about the nullification instruction in the trial court despite the trial court's express invitation to do so, the CCA concluded that he forfeited a federal harm analysis under *Chapman*. Smith's Appendix 1, p. 7, n.8. Ironically, such failure to object does *not* forfeit a harm analysis under Texas law; it merely determines the level of

harm required for reversal. Smith's Appendix 1, p. 13 (citing *Almanza*, 686 S.W.2d at 171). The CCA concluded therefore, that the appropriate harm analysis would be the "egregious harm" analysis in state law.

In doing so, the CCA did not reject this Court's finding of error—the CCA *assumed* the charge was "constitutionally deficient under *Penry II*." Smith's Appendix 1, p. 12. And the CCA's subsequent harm analysis was more protective of Smith than the federal harm analysis he would have this Court apply. Under these circumstances, the CCA's application of state law did not violate the Constitution, and the CCA's disposal of the case was an independent and adequate state ground that precludes review. *See Doan v. Brigano*, 237 F.3d 722, 728 (6th Cir. 2001) (holding that whether state rule is sufficient to support lower court's judgment depends upon whether the rule conflicts with the Constitution) (citing Erwin Chemerinsky, *Federal Jurisdiction*, § 10.5.2, at 619 (2d ed. 1994)); *see also Connecticut v. Johnson*, 460 U.S. 73, 88 (1983) (Stevens, J., concurring) (noting that federal law does not require a state appellate court to make a harmless-error determination; *Chapman* merely permits it). Accordingly, this Court lacks jurisdiction to review Smith's claims.

V. The CCA's decision to assess the record for harm was proper and properly implemented.

Smith's vilification of the CCA as a renegade court seeking to evade the prior ruling of this Court is unfounded. The CCA's harm analysis in this case was the only proper avenue for the CCA to pursue under the circumstances: automatic reversal would have been improper because *Penry II* error is not structural error.

A. *Penry II* error is amenable to a harmless error review.

Although this Court has yet to speak on the issue, there is no real dispute in *this* case that *Penry II* error is subject to a harm analysis. Smith has modified his position on this point. He argued on remand to the CCA that the error in this case was structural and not amenable to review. State Appendix 4, p. 8-10. He now concedes in a footnote that this Court has suggested such claims are subject to harmless error review, although he notes that this Court "might well conclude" the opposite. Petition, p. 21, n.14.

Penry II charge error is more akin to "an error in the trial process itself," rather than a structural "defect affecting the framework within which the trial proceeds." *See Arizona v. Fulminante*, 499 U.S. 279 310 (1991). It occurs during the presentation of the case to the jury and is amenable to a harmless error analysis because it may be quantitatively assessed in the context of other evidence presented at trial. *See Brecht v. Abramson*, 507 U.S 619, 629 (1993); *see, e.g., Nelson v. Dretke*, 442 F.3d 282, *78-79 (5th Cir. 2006) (Dennis, J., concurring). If a court can easily assess the record for harm, which it can and did in this case, then the error cannot be deemed "structural." *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006) (stating that a conclusion of structural error rests on the difficulty of assessing the effect of the error). This rule should hold true especially on collateral review, which honors the State's interest in the finality of convictions, its sovereign power to punish offers, and its good-faith attempts to honor constitutional rights. *Brecht*, 507 U.S. at 635.

Further, the following authorities all strongly support the notion that *Penry II* error should be reviewed for harm. *Brecht*, 507 U.S. at 638 (holding that habeas relief is warranted only if the constitutional error at issue is structural error or had a "substantial or injurious" effect on the verdict); *Calderon v. Coleman*, 525 U.S. 141, 144, 146 (1998) (holding that jury charge error which potentially prevented the jury's consideration of constitutionally relevant mitigation evidence was subject to *Brecht* harmless error review); *see also Brown v. Payton*, 544 U.S. 133, 166 (2005) (Souter, J., dissenting) (applying *Brecht* harm analysis to *Penry*-like error); *Nelson*, 442 F.3d at *78-79 (Dennis, J., concurring) (applying *Brecht* harmless error standard to *Penry I* error).

The CCA cited and relied on this Court's opinions in *Brown*, *Brecht*, and *Calderon* in its attempt to carry out this Court's apparent intent on remand. Smith's Appendix 1, p. 17, n. 42. Accordingly, the CCA had strong legal authority for conducting a harmless error review.

Moreover, the state harm standard used by the CCA below was more protective of Smith than a federal harm standard would be. The CCA examined the entire record to determine whether Smith suffered actual, not just theoretical, "egregious harm" from the presumed deficiency in the jury charge such that he did not have a "fair and impartial trial." Smith's Appendix 1, p. 10, 14. Under the federal standard in *Brecht*, Smith would have to establish actual prejudice by showing the error had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht*, 507 U.S. at 637. Thus, under the Texas standard, Smith need only show that he did not have a fair and impartial trial.

Under the federal standard, Smith would have to show the error effected the outcome of the proceeding, a conclusion that is hardly ever supported by objective facts in the record. As Smith received the benefit of a more favorable harm analysis, the CCA's decision was proper, and Smith's petition should be denied.

B. The CCA's harm analysis did not contradict this Court's holding that *Penry II* error exists in this case.

Smith insists that the CCA's more lenient "egregious harm" analysis is nothing more than a disagreement with this Court's conclusion of error in this case. Specifically, Smith complains the CCA disagreed with this Court's decision that the jury could not give adequate effect to the mitigating evidence via the "special issues supplemented by the nullification instruction." Petition, p. 18.

First, as noted above, this Court's per curiam opinion did not hold that the statutory punishment issues were an insufficient vehicle for the jury to consider Smith's evidence. The Court held that the nullification instruction was insufficient under *Penry II*. Whether the statutory punishment issues were sufficient was an issue left open for the CCA to re-examine using the proper constitutional relevance test.

Second, the CCA, uncertain as to the state of *Penry II* jurisprudence, assumed error in this case. The CCA assumed that the jury *could not give* "full" effect and consideration to Smith's evidence of limited mental ability. For that reason, the CCA analyzed the entire record to assess whether Smith's trial was nonetheless fair and impartial. Smith's Appendix 1, p. 12.

Third, the CCA's analysis of the entire record could not logically supplant a holding of *Penry I* error even if this Court had made one. An inquiry into whether mitigating evidence is outside the ambit of a jury charge combines a relevance assessment with an examination of the language in the jury charge. *See, e.g., Boyde*, 494 U.S. at 380 (holding the legal standard for reviewing ambiguous jury instructions is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence). It asks the theoretical question: is there a reasonable likelihood that the jury using these instructions could not give "sufficient effect" (however that is defined) to the evidence introduced?

By contrast, an inquiry into egregious harm is not a "reasonable likelihood" or "theoretical" assessment of the charge and the mitigation evidence. It looks at the whole trial, from voir dire to closing argument, to determine whether there is *actual* harm in the sense that the defendant's trial was not fair and impartial. It looks to how well the jurors were educated during voir dire, it compares the strength of the mitigating evidence against the strength of aggravating evidence, it looks to how that evidence was argued by counsel and how well it fit with counsel's theories, and it looks to whether the State emphasized the error in its closing argument. Smith's Appendix 1, p. 13-18. Then, based on the erroneous charge given, it determines whether there was actual harm. Appendix 1, p. 18. This is simply not the same as an "error" inquiry, Smith's contortive arguments to the contrary notwithstanding.

For example, Smith complains at length that the CCA should not have examined the voir dire examination in this case. Petition, p. 18-22. Of course, the voir dire examination is the strongest evidence in this case against Smith's position. It indicates that *every juror who sat in judgment of Smith agreed to use the nullification instruction to change a true "yes" answer to "no" if he or she believed the mitigating evidence warranted a life sentence.*[8] It also shows that defense counsel was not ignorant of the possibility (and therefore could have raised the objection) that jurors might consider using the nullification instruction as "cheating" or violating the oath to render a "true verdict."[9] Thus, the voir dire examination addressed and refuted the theoretical concerns underlying this Court's rejection of nullification instructions in general by actually addressing those concerns in this case. The CCA's consideration of the voir dire record is not a rejection of the conclusion that nullification charges are "reasonably likely" to be inadequate under the Eighth Amendment. Rather, the CCA's analysis acknowledges the harmless error rule—both federal and state—that convictions should not be reversed on

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[8] *See* 6RR 149-53 (Gary Powell, Juror No. 1); 8RR 112-13, 133-34 (Ava Meyer, Juror No. 2); 10RR 118, 136-37 (Donna Coulter, Juror No. 3); 11RR 60 (Carol Keyte, Juror No. 4); 11RR 162-65 (Thomas Morrison, Juror No. 5); 13RR 66-67 (Dottie Wright, Juror No. 6); 15RR 31-32 (Teresa Lane, Juror No. 7); 16RR 18-19 (Steven Dillow, Juror No. 8); 16RR 70-71 (Janis Zeigler, Juror No. 9); 20RR 187-89, 204-06 (Lynn Bartholomew, Juror No. 10); 21RR 53-54 (Mary Foote, Juror No. 11); 25RR 105-07 (Derek Fisher, Juror No. 12).

[9] Defense counsel told one juror specifically that, in following the mitigation instruction, "You're not cheating or not giving a true verdict, you're following the Court's law or the Court's rules." (15RR 32).

habeas review simply because harm is "reasonably likely." Under both federal and state harmless error review, the harm must be actual. *Brecht*, 507 U.S. at 637; Smith's Appendix 1, p. 6, 14. The voir dire record properly supports the CCA's conclusion that, in actuality, Smith was not denied a fair and impartial trial.

Likewise, Smith complains about the CCA's review of the closing arguments in this case. Petition, p. 22-24. Such a review enabled the CCA to determine whether defense counsel used the mitigating evidence to support a defensive theory, whether the defense theory relied on the jury's use of the erroneous charge, and whether the State exaggerated the charge error is some way. For example, the CCA's consideration of closing arguments allowed them to address this Court's concern in *Tennard* as to whether the prosecutor exacerbated the confusion caused by the charge. *See Tennard*, 542 U.S. at 288-89) (holding that reasonable jurist might well have given Tennard's evidence of low IQ aggravating effect because prosecutor told them to do so); Smith's Appendix 1, p. 17 (holding that prosecutor never suggested the jury should ignore Smith's mitigation evidence). So the closing arguments also properly supported the CCA's conclusion that Smith in actuality was not denied a fair and impartial trial.

Thus, after assuming the statutory issues were insufficient in this case because there was a reasonable likelihood that the jury was prevented from considering constitutionally relevant evidence, the harm inquiry conducted by the CCA concluded that, in actuality, Smith was not harmed based on the record as a whole. These are not mutually exclusive positions, as Smith argues. If they are, then every harmless error

conclusion would be improper. Such a result would be contrary to an overwhelming body of existing state and federal jurisprudence.

Admittedly, the CCA's analysis does not speak to whether the mitigating evidence was sufficient to convince one juror to spare Smith's life. This is not the review required by the *Almanza* egregious harm standard. Smith's contention that a "genuine" harm analysis would ask such a question is merely an assertion that the federal *Brecht* standard should apply. Petition, p. 21. Although Smith never argued for the application of this federal standard in the CCA, he may certainly do so now in federal habeas court.

C. The CCA's conclusion that Smith did not object at trial was patently correct and not an attempt to evade this Court's per curiam opinion

Finally, Smith contends that the CCA "twice addressed the merits of his *Penry* claim" prior to this Court's per curiam reversal. Petition, p. 24-25. On both occasions, Smith contends, the CCA declined to find procedural default. He concludes that the use of the "egregious harm" standard of review, which applies when a Texas defendant fails to make a trial objection to the error, constitutes a finding of procedural default and an impermissible attempt to evade the Court's ruling on the merits.

Smith's dramatic claim of the CCA's "bait and switch" tactic belies the fact that the CCA *assumed* error on remand. Petition, p. 17. The CCA assumed the worst case scenario because of its uncertainty regarding this Court's *Penry II* jurisprudence. The CCA assumed that Smith's evidence of limited mental ability was not fully encompassed by the two special issues. Smith's Appendix 1, p. 11-12. The State is at a loss to understand how the CCA's assumption of the very error Smith claims this Court to have

found amounts to an attempt to evade that error. Moreover, as will be demonstrated below, the CCA did not twice reject a procedural default argument by addressing Smith's claims on the merits.

On direct appeal, the CCA had no need to address procedural default because the CCA understood Smith's complaint to be a statutory one that was raised in his pretrial motion and, therefore, obviously preserved for review. State's Appendix 1, p. 29. The CCA held that the deficiency in the Texas statute was corrected by the nullification instruction given. Smith's Appendix 3, pp. 10-11

In its original habeas opinion, the CCA did not address and did not need to address procedural default. This is because Texas law does not generally allow for procedural default of jury charge error when a defendant fails to object at trial. *See Jimenez v. State*, 32 S.W.3d 233, 237 (Tex. Crim. App. 2000). As discussed at length above, *Almanza* simply requires a more stringent harm analysis when there is no objection at trial. For this reason, the State did not assert a procedural default argument based on the failure to object at trial when Smith first challenged the nullification instruction on collateral review.[10] Texas law simply did not permit it.[11]

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[10] The State argued instead, and the trial court agreed, that the issue was defaulted because it had been addressed on direct appeal. Petition, p. 9. This is not the "about face" that Smith suggests, for the nullification charge *had* been addressed by the CCA on direct appeal. The CCA held (as it did for all of the twelve-year period between *Penry I* and *Penry II*) that the nullification instruction properly cured the unconstitutionality of the Texas death penalty statute. Smith's Appendix 3, p.11. At the time the State asserted its procedural default argument in September of 2000, *Penry II* had not yet issued and there was no justification for revisiting the CCA's holding on direct appeal.

[11] Judge Hervey's dissenting opinions seem to belie this assertion that jury charge error cannot be

The CCA's failure to address a procedural default argument in its original habeas opinion is not equivalent to considering and rejecting a procedural default argument. And the CCA's conclusion on remand that Smith failed to object and therefore must meet the egregious harm standard for reversal is not akin to a procedural default. In fact, Smith concedes as much in his petition when he states the CCA did not hold Smith's claim procedurally defaulted on remand. Petition, p. 25. Rather, Smith argues that the CCA subversively found "procedural default" by applying a more burdensome harm analysis and erroneously concludes that the CCA therefore did not "strictly or regularly" follow the Texas rules of procedural default. Petition, p. 26-27.

In all stages of this litigation, the CCA did exactly what Texas law requires when analyzing unobjected-to jury charge error. *Jimenez*, 32 S.W.3d at 237. The CCA never considered whether the jury charge complaint was forfeited by Smith's failure to object because that rule does not generally apply to charge error; and it did not conclude otherwise on remand. Smith was treated in a consistent manner throughout the litigation of this case, consistent with the treatment of other capital murder defendants. *E.g. Penry*

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procedurally defaulted. But in fact, the dissenting opinions cite no authority in Texas law permitting such default. Smith's Appendix 1, 18; Smith's Appendix 2, p. 15.

And as Smith points out, the State struggled to persuade the CCA to consider the lack of a trial objection as procedural default on remand using Judge Hervey's dissent. The State argued that a *proper* finding of procedural default could be made on collateral review (as opposed to direct appeal) and provide a *proper* theory for affirming the conviction. Nevertheless, the CCA majority opinion on remand refused to address the State's procedural default argument.

v. State, 178 S.W.3d 782, 788 (Tex. Crim. App. 2005) (reversing Johnny Paul Penry's third death penalty sentence for constitutional jury charge error of a different sort).

But perhaps most importantly, the "egregious harm" standard, despite its name, is not the "exceptionally high" or "daunting" standard of harm Smith would have this Court believe. Petition, pp. i, 28. It seeks merely to assess the record for actual error and determine whether the defendant had a fair and impartial trial. *Jimenez*, 32 S.W.3d at 238. This is less onerous than the verdict-oriented federal analysis that Smith would have this Court apply.

Finally, Smith challenges the CCA's basis for finding he did not assert a trial objection to the charge and argues that his objection to a statute is the equivalent to an objection to the charge. During pretrial proceedings, Smith filed a "Motion to Reveal Mitigation Charge." Smith's Appendix 6. In the motion, defense counsel acknowledged the uncertain state of the law after *Penry I* and revealed that he anticipated presenting *Penry* evidence at trial. Defense counsel asked to see the court's charge on mitigation evidence prior to the commencement of voir dire. Smith's Appendix 6, p. 88-89. The trial judge granted this request. Prior to the commencement of voir dire, the trial judge confirmed that defense counsel had received a copy of the mitigation charge, as requested. Smith's Appendix 8, p. 3. The court then told defense counsel:

> If you see something in that charge that you'd like worded differently or you think could be made clearer or better, I'm always willing to entertain different wording or different ways of putting the idea. So if you come up with something you like better, just let me know and I'll look at it.

Smith's Appendix 6, p. 3-4. Despite the trial court's invitation, counsel made no objections or changes to the nullification charge.

Voir dire commenced. As noted above, all the prospective jurors who ultimately served on the jury were carefully questioned as to whether they understood and could apply the nullification charge if the case went to punishment. During the punishment charge conference, defense counsel made lengthy objections to the charge, *none* of which involved the nullification instruction. (32RR 155-67). Later, Smith filed a motion for new trial and an amended motion for new trial, neither of which contained any jury charge complaint. (CR 126, 127).

Smith repeatedly failed to offer a trial objection to the nullification instruction of which he now complains and declined the trial judge's specific pretrial invitation to do so. *Compare Penry II*, 532 U.S. at 803 (noting that Penry offered definitions of "deliberately" which trial court refused to give).

Nor did Smith raise the charge issue on direct appeal. In his sixth point of error, Smith challenged a pretrial ruling rejecting Smith's claim that code of criminal procedure article 37.071 was unconstitutional in that it provided no effective vehicle for a jury to apply mitigating evidence. State's Appendix 1, p. 29-31. Smith's complaint on direct appeal was a statutory one. He did not complain about or even mention the court's charge, perhaps because he believed the charge error was not preserved or because he agreed with Texas law at that time (and for the twelve years following *Penry I*) that the

nullification instruction cured the *Penry* problem. State's Appendix 1; *see Fuller v. State*, 829 S.W.2d 191, 209 (1992).

Smith then filed his first application for writ of habeas corpus, which was dismissed as untimely. It likewise contained no complaint about the nullification charge. State's Appendix 2, p. 3-5.

Nine years after Smith declined the trial judge's invitation to object to the nullification charge, he challenged that charge for the first time on habeas review. State's Appendix 3. He presents no justification for having waited so long, and the delay serves only to frustrate society's interest in the prompt administration of justice. There is no doubt that Smith's attorney was aware of the issue at trial, and by all accounts, approved of the charge. Defense counsel's comments during voir dire that compliance with the nullification instruction is not "cheating" or "not giving a true verdict" clearly indicates he was aware of the issue later raised in *Penry II*. (15RR 32). The fact that *Penry II* had not yet issued is inconsequential: *Penry II* was not new law but only repeated the holding in *Penry I*. *See Robertson v. Cockrell*, 325 F.3d 243, 255 (5th Cir. 2003) (en banc). Moreover, Smith's habeas application raising the nullification charge complaint did predate *Penry II*, so, in the end, issuance of *Penry II* was inconsequential to Smith's ability to challenge the nullification instruction.

Consequently, the CCA properly concluded that Smith made no objection to the charge at trial. Indeed, Smith made no objection to the charge until his second state writ application, nine years after trial. Moreover, his pretrial motion objecting to the Texas

statute is not the same as an objection to the jury charge, as Smith asserts. The case Smith relies on, *Osborne v. Ohio*, actually supports the State's position on this point.

Osborne challenged the constitutionality of a pornography statute as a violation of due process. *Osborne v. Ohio*, 495 U.S. 103, 122-23 (1990). The Ohio Supreme Court rejected his claim on the ground that the Ohio statutes required the prosecution to prove "lewd exhibition" and scienter. Osborne argued that the jury charge in his case contained no such requirements. The Ohio Supreme Court rejected these contentions because Osborne had failed to object to the jury instructions given. *Osborne*, 495 U.S. at 107-08.

This Court held that Osborne's complaint about the failure to instruct on lewdness was preserved because Osborne challenged the statute in a motion to dismiss and, when it was overruled, *immediately proposed various jury instructions*. *Id.* at 124-25. Under these circumstances, the Court concluded that Osborne adequately pressed the issue to the court and nothing would be gained by requiring a second objection to the charge. *Id.*

The facts of this case are vastly different. Smith requested to look at the jury charge prior to voir dire, and the trial court invited him to suggest changes to make it clearer or better. Unlike Osborne, Smith chose not to do so. Smith's refusal to provide any objection to the charge amounts to an acceptance of the charge. In fact, Smith's actions in requesting the charge and then failing to respond to the judge's request for objections is precisely the type of sandbagging of which Smith accuses the State. Petition, p. 27.

Moreover, this Court further held in *Osborne* that Osborne's second due process complaint (regarding the failure to charge scienter) was *not* preserved by Osborne's pretrial objection to the statute. *Id.* at 123. This Court held that the charge violated state law for failing to include scienter and that the State had an important interest in ensuring that "counsel do their part in preventing trial courts from providing juries with erroneous instructions." *Id.* Thus, Osborne's failure to object specifically to the charge forfeited his complaint, despite his timely challenge to the statute. Smith's reliance on *Osborne* is misplaced: *Osborne* indicates that Smith's failure to object to the charge at trial would, in fact, forfeit his complaint in federal court despite his timely objection to the statute.

Of course, the CCA here did not need to assess the sufficiency of the objection for purposes of procedural default. The CCA needed to decide only whether Smith timely objected to the charge. Clearly, he did not.

The CCA's harmless error analysis was properly conducted under a more lenient standard than federal law would provide. If Smith now prefers a federal harm analysis, his complaint should be made in federal habeas court.

CONCLUSION

For the foregoing reasons, Smith's petition for writ of certiorari should be denied.

Respectfully submitted,

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SUMMARY OF ARGUMENT IN REPLY

Respondent's Brief in Opposition ("BIO"), like the decision below, rests on the view that this Court's per curiam opinion does not mean what it says and therefore does not command rigorous adherence. Though this Court concluded that the Texas special issues did not provide an adequate vehicle for considering Petitioner's mitigating evidence because they "had little, if anything, to do with the mitigation evidence petitioner presented," *Smith v. Texas*, 543 U.S. 37, 48 (2004)), Respondent suggests that this holding is not binding because "the remark is not supported by any *Penry I* analysis or a cite to case law." BIO at 12. In similar fashion, Respondent critiques this Court's insistence that capital sentencing schemes must allow jurors to give "'*full* consideration and *full* effect to mitigating circumstances,'" *Smith*, 543 U.S. at 37 (quoting *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*) (emphasis in original), because Respondent maintains that such a rule would "fl[y] in the face" of a prior Court decision. BIO at 16, n.7. The tenor of Respondent's argument, like that of the decision of the CCA, underscores the central justification for this Court to grant certiorari in this case: this Court's opinions, especially those summarily reversing state court judgments, must be followed whether or not the state court or the district attorney are fully persuaded by their logic or doctrinal pedigree. Proceedings on remand should not be an occasion for disappointed state actors to reassess the wisdom of this Court's decisions, and this Court should neither tolerate nor reward the methodology embraced by the CCA and endorsed by Respondent of picking and choosing among the Court's conclusions depending on whether they deem them persuasive.

With respect to the merits, the CCA's finding of no "egregious harm" directly contradicts

this Court's firm and unequivocal conclusion that jurors were unable to give effect to Petitioner's mitigating evidence. Respondent urges that is entirely a matter of state law how to frame the test for harm relating to federal constitutional error. Whatever the merits of that position, the CCA's "no harm" conclusion rested entirely on its rejection of this Court's federal constitutional judgment that jurors were in fact unable to give constitutionally adequate effect to Petitioner's mitigating evidence in light of all that transpired at trial. Accordingly, even if the CCA were authorized to impose its "egregious harm" standard on remand, its application of that standard cannot stand where it contradicts this Court's federal constitutional judgment.

Moreover, the CCA's decision to impose the "egregious harm" standard on remand -- based on Petitioner's purported failure to make an appropriate objection to the sentencing instructions at trial -- constitutes an impermissible effort to frustrate this Court's enforcement of federal constitutional norms. The CCA refused to find Petitioner's claim procedurally defaulted prior to this Court's intervention, and its belated assertion of such a procedural obstacle is without justification. Accordingly, the appropriate inquiry on remand should have been whether the federal constitutional error identified by this Court was harmless beyond a reasonable doubt, and the CCA's own account of Petitioner's extensive mitigating evidence precludes a finding of no harm.

1. **_Certiorari_ is warranted because the CCA's basis for denying relief on remand was identical to its argument that this Court rejected in its summary reversal. The CCA's reassertion of its dissent from this Court's *Penry II* jurisprudence challenges this Court's preeminent role in constitutional interpretation and warrants this Court's intervention.**

In its opinion that this Court summarily reversed, the CCA asserted that the nullification

instruction clearly informed jurors of their ability to change their answers to the special issues if they believed that Petitioner's mitigating evidence warranted leniency. 132 S.W.3d at 416. Two judges on the CCA went further and emphatically voiced their disagreement with this Court's controlling precedent, indicating that "we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding, and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case," 132 S.W.3d at 427 (Hervey, J., joined by Keasler, J., concurring), employing a "*But see*" citation form to refer to *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). Those two judges also insisted that "the Constitution does not require a vehicle to accord 'full' weight to a defendant's mitigation evidence," 132 S.W.3d at 427, notwithstanding this Court's express declaration to the contrary in *Penry II*. 532 U.S. at 797.

In its summary reversal of the CCA decision, this Court explicitly rejected the CCA's holding that the sentencing instructions in this case, in the context of the trial, adequately facilitated consideration of Petitioner's mitigating evidence. First, this Court indicated that the purported clarity of the instruction was still undermined by the prosecutor's insistence that jurors "follow the law" and answer the special issues affirmatively if the State met its burden of proof, 543 U.S. at 48 n.5, and the fact that the actual verdict form "made no mention whatsoever of mitigation evidence." *Id.* at 48. More important, this Court assumed for the purposes of argument that the nullification message was sufficiently clear but concluded that such clarity "could possibly have intensified the dilemma faced by ethical jurors." *Id.* From the perspective of this Court, "even if we were to assume that the jurors could easily and effectively have

comprehended an orally delivered instruction directing them to disregard, in certain limited circumstances, a mandatory written instruction given at a later occasion, that would not change the fact that the 'jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence.'" *Id.* (quoting *Penry II*, 532 U.S. at 801).[1]

On remand, in its decision presently before this Court, the CCA again argues that the nullification instruction was sufficiently clear for jurors to give effect to Petitioner's evidence, especially given the fact that the jurors "[o]verwhelmingly" agreed on voir dire that they could "change a 'yes' answer to 'no' if instructed by the judge to do so upon finding sufficient mitigating evidence." 185 S.W.3d at 468. Two judges on the CCA again reject the "full consideration and full effect" standard, instead maintaining "that the Constitution requires only that a jury be provided with a vehicle to meaningfully consider mitigating evidence and not, as the Court's opinion seems to decide, a vehicle to 'fully and completely consider mitigating evidence.'" 185 S.W.3d at 473 (Hervey, J., joined by Keasler, J., concurring). Those two judges join the majority in asserting that because the nullification instruction was "carefully explained to the jurors during voir dire," no *Penry II* harm occurred. Having recast their pre-remand conclusion of "no *Penry II* violation" into a post-remand holding of "no *Penry II* harm," these judges defiantly reassert that "we are not bound by the view expressed in *Penry II* that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case." 185 S.W.3d at 474.

Respondent, taking the same tack, defends the CCA opinion on remand by likewise

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[1] This Court also reaffirmed, in the first paragraph of its decision, that the appropriate test for assessing capital sentencing instructions is whether they "allow the jury to give *full* consideration and *full* effect to mitigating circumstances." 543 U.S. at 38 (internal quotations and citations omitted) (emphasis in original).

ridiculing this Court's repeated articulation of its individualization standard, describing the Court's language as a "suggestion" rather than binding precedent. BIO at 16, n.7 ("[T]he 'full consideration' rule suggested in this Court's per curiam opinion flies in the face of this valid and binding precedent") (referring to *Johnson v. Texas*, 509 U.S. 350 (1993), which is unfavorably cited in both *Penry II*, 532 U.S. at 797, and this Court's summary reversal in *Smith*, 543 U.S. at 38, 46). Respondent also insists that this Court's holding that the deliberateness and dangerousness special issues were inadequate to facilitate consideration of Petitioner's mitigating evidence[2] was not truly binding because this Court failed to offer support for its conclusion. BIO at 12 ("This remark suggests that the statutory issues may be insufficient if an analysis were made, but the remark is not supported by any *Penry I* analysis or a cite to case law.").

The CCA opinions and the Respondent's defense together reflect an unwillingness to toe the constitutional mark. Respondent insists that no compelling reason exists for this Court to grant review because Petitioner can obtain "the federal harmless error analysis he desires" in federal habeas corpus. BIO at 17. Petitioner's basis for certiorari is not that he deserves a federal forum for reviewing the harmfulness of the constitutional error,[3] but rather that state courts may not repeatedly and openly reject binding precedent from this Court. This ground for certiorari is particularly compelling when the defiance transparently follows this Court's uncommon exercise of its summary reversal power, and the state court advances precisely the same arguments that the summary reversal unequivocally rejected.

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[2] "Just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Smith*, 543 U.S. at 48.

[3] The well-known limitations on the scope of federal habeas review, including the substitution of reasonableness review for de novo review of federal constitutional claims adjudicated in state court, obviously diminish the

2. The CCA's purported "egregious harm" analysis undertakes precisely the same inquiry as this Court's merits analysis and reaches the opposite conclusion. The CCA holding is therefore inconsistent with this Court's remand.

In the CCA's view, supported by Respondent, this Court's opinion found only a "theoretical" possibility that jurors would be unable to give effect to Petitioner's mitigating evidence, 185 S.W.3d at 468, and a close examination of the events at trial revealed that jurors in fact likely understood their ability to nullify their answers to the special issues. This conclusion misrepresents and misunderstands this Court's opinion. This Court did engage in a contextualized evaluation of the nullification instruction, finding that the prosecution's admonition to jurors to "follow the law" in fact complicated the nullification message and that "the nullification instruction may have been more confusing for the jury to implement in practice than the state court assumed." 543 U.S. at 48 n.5. Moreover, this Court emphasized that the verdict form did not make any "mention whatsoever of mitigation evidence," *id.* at 48, again undermining any confidence that jurors would have believed themselves empowered to give effect to such evidence by untruthfully answering the special issues. More to the point, this Court's conclusion of Eighth Amendment error required not merely a finding on an abstract defect in the sentencing instructions in isolation but a finding that the instructions *in fact* likely prevented jurors from giving effect to mitigating evidence "in the light of all that ha[d] taken place at the trial." *Boyde v. California*, 494 U.S. 370, 381 (1990); *see also Penry II*, 532 U.S. at 800 (citing *Boyde* as governing standard in assessing whether, in the context of the trial, there is "a reasonable likelihood" that the challenged instruction interfered with jurors' consideration of

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prospects of Petitioner receiving federal habeas relief based on the state court's misuse of its egregious harm standard.

mitigating evidence). This Court ultimately concluded that even the clearest nullification instruction cannot avoid the "ethical problem" of requiring jurors to lie in order to give effect to mitigating evidence. 543 U.S. at 47.

Notwithstanding the clarity of this Court's reasoning, the CCA identifies three aspects of Petitioner's trial to support its view that jurors both understood and could follow the nullification instructions: the nullification instruction was carefully explained to each juror, 185 S.W.3d at 468, the prosecution did not tell jurors to ignore Petitioner's mitigating evidence, *id.* at 471, and defense counsel offered extensive mitigating evidence and argument in support of defendant's position that his life was "worth saving." *Id.* at 472. Reliance on these facts obviously ignores the Court's ultimate conclusion that even clear nullification instructions are unworkable because they place ethical jurors in an intractable ethical dilemma. Such selective canvassing of facts also ignores this Court's express view that the prosecution's closing argument and the verdict form contradicted the claim of clarity advanced by the CCA in its original opinion. In short, the CCA's opinion on remand ignores this Court's own evaluation of the sentencing instructions within the context of Petitioner's trial and rejects as well this Court's insistence that no context whatsoever can render nullification instructions a reliable means of facilitating consideration of mitigating evidence.

Particularly unconvincing is the CCA's assertion that because Petitioner's counsel "did a superb job of weaving [Petitioner's mitigating] evidence into a compelling theory of the case," 185 S.W.3d at 472, the jury was more likely to understand itself to be empowered to give effect to Petitioner's "extensive mitigating evidence," *id.* at 471, and hence Petitioner suffered no

egregious harm. The strength of Petitioner's mitigating case suggests precisely the opposite. Because this Court concluded that the nullification instruction, in the context of Petitioner's trial, did not afford a reliable means of facilitating consideration of Petitioner's evidence, the fact that defense counsel offered a "compelling theory of the case" based on Petitioner's "extensive" mitigation compels the conclusion that Petitioner suffered "egregious harm" as a result of the constitutional violation found by this Court.

Overall, the CCA's "egregious harm" test, in focusing on the events at trial to determine whether jurors were in fact precluded from giving effect to mitigating evidence, precisely replicates this Court's inquiry for assessing whether Petitioner was deprived of his right to individualized sentencing. Having framed the inquiry in this way, the CCA may not ignore the facts that this Court deemed most salient in making that assessment. Nor may the CCA contradict this Court's ultimate conclusions that the context of Petitioner's trial aggravated rather than mitigated the failings of the special issues in combination with the nullification instruction and, in any event, that context cannot overcome the inherent ethical dilemma posed by nullification instructions in capital sentencing. Thus, even assuming that the CCA was permitted to impose its "egregious harm" standard on remand, its conclusion of no harm cannot be reconciled with this Court's explicit holding that jurors were unable to give constitutionally adequate effect to petitioner's mitigating evidence in light of all that transpired at trial.[4]

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[4] Respondent, gamely trying to defend the CCA's revisiting of the merits of Petitioner's claim, urges that the "egregious harm" test is less onerous than the "federal" test for harm. BIO at 20. In the abstract, this seems unlikely, because the federal constitutional harmless error test requires a finding beyond a reasonable doubt that the constitutional error did not contribute to the verdict whereas the "egregious harm" test as framed by the CCA asks more broadly whether a defendant's trial on the whole was "fair and impartial." 185 S.W.3d at 464, 467 n.38. But Respondent is undoubtedly accurate in viewing the egregious harm test as less demanding in its application in this case, because the test, as implemented by the CCA, merely duplicates the analysis for assessing whether constitutional error occurred in the first place. To the extent the egregious harm test asks whether the error at trial

3. **The CCA's imposition of an "egregious harm" standard on remand based on Petitioner's purported failure to object at trial cannot be squared with the CCA's prior rulings in this case or Texas law, and thus represents an illegitimate effort to nullify the consequences of this Court's exercise of appellate review.**

When this Court exercised its discretionary authority to review the prior CCA opinion in this case, it did so with an awareness that the CCA had declined to impose any procedural obstacle to the merits review of Petitioner's claims under *Penry I* and *Penry II*. As this Court noted, although "[f]our judges [below] would have found petitioner's claim procedurally defaulted, [t]he majority of the court . . . reached petitioner's claims on the merits." 543 U.S. at 43 n.3. On remand, though, the CCA insists that Petitioner failed to make a proper objection to the nullification charge at trial and therefore must demonstrate "egregious harm" to warrant relief.

As an initial matter, this sort of "bait and switch" approach to procedural default constitutes an improper manipulation of this Court's appellate jurisdiction. This Court scrupulously avoids addressing federal constitutional claims that are controlled by state law principles because to do so would run afoul of Article III. Moreover, the vindication of state law interests is hardly served by ignoring them unless and until state interpretation of federal law is rejected. For these reasons, the CCA's refusal to impose state procedural obstacles prior to this Court's remand must be deemed a definitive holding that the CCA cannot revisit simply to avoid the effect of this Court's decision. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 244-45 (1959). Indeed, the CCA's refusal to recognize a procedural obstacle until remand suggests strongly that the imposition of the obstacle represents not routine application of state

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actually inhibited juror consideration of mitigation evidence in the context of Petitioner's trial, it adds nothing to *Boyde*'s requirement for individualization error, and that error was conclusively established by this Court as it

law principles but hostility to the enforcement of a federal right.

Respondent nonetheless contends that the CCA's imposition of its "egregious harm" test on remand, based on Petitioner's purported failure to make a contemporaneous objection, is typical of the CCA's treatment of similar claims on state habeas. Moreover, Respondent contends that the CCA's decision not to procedurally default Petitioner's claim based on the same facts prior to the remand was likewise appropriate because unpreserved jury charge errors are routinely addressed on state habeas notwithstanding the lack of an appropriate objection at trial. BIO at 28. The facts of this case and established caselaw belie Respondent's assertions.

a. The CCA's decision not to procedurally default Petitioner's federal constitutional claim prior to remand for lack of a contemporaneous objection in fact reflected a determination by the CCA that Petitioner had adequately preserved that claim.

The four CCA judges who concurred in the judgment prior to remand, insisting that Petitioner's claim was procedurally defaulted, clearly asserted than such claims were defaulted as a matter of state law in the absence of a contemporaneous objection. Moreover, Respondent urged precisely the same argument after this Court summarily reversed the CCA's original decision, stating without qualification that "Applicant has procedurally defaulted this claim under Texas law because he did not raise any objection to the charge at trial or on appeal." State's Brief on Remand ("SBR") at 7 (attached as Appendix 11) (citing the concurring opinions from the CCA's decision denying relief prior to the remand). Although Respondent now claims that "Texas law does not generally allow for procedural default of jury charge error when a defendant fails to object at trial," BIO at 28, Respondent repeatedly said the opposite in its brief on remand and offered extensive citations in support of that proposition. *See* SBR at 4 ("Under Texas case

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considered the context of Petitioner's trial.

law, Eighth Amendment claims may be defaulted by the failure to object at trial."). Indeed, Respondent's Brief on Remand encouraged the CCA to find Petitioner's claim procedurally defaulted for lack of a contemporaneous objection because the "Supreme Court will not review a decision by a state's highest court if it rests on a state law ground independent and adequate by itself to support the result." SBR at 8. Having unequivocally argued in its brief on remand that Petitioner's claims were procedurally defaulted based on Petitioner's failure to make a contemporaneous objection to the charge, and having done so in order to gain the strategic advantage of insulating the CCA judgment from further review by this Court, it is astonishing that Respondent now insists that "Texas law simply [does] not permit it." BIO at 28. Respondents points to no intervening caselaw to justify its startling about face.

Indeed, there is no law -- intervening or otherwise – supporting Respondent's position. The sole case Respondent cites, *Jimenez v. State*, 32 S.W.3d 233 (Tex. Crim. App. 2000), held only that jury charge error can be reviewed *on direct appeal* for "fundamental error" and does not address whether such claims can be forfeited for purposes of state habeas review. On the other side, a recent federal district court decision has concluded that Texas has consistently and routinely defaulted federal constitutional claims on state habeas based on noncompliance with Texas's contemporaneous objection rule, including claims involving federal constitutional challenges to Texas jury instructions. See *Martinez v. Dretke*, 426 F. Supp.2d 403, 527 (W.D. Tex. 2006) ("Petitioner alleges no facts and cites this Court to no Texas case law showing the Texas courts have inconsistently applied the contemporaneous objection rule in similar contexts, i.e., with regard to alleged constitutional errors in a jury charge."). Indeed, that court could find

"no instances in which the Texas Court of Criminal Appeals has entertained the merits of a claim challenging the constitutionality of a punishment-phase jury charge when raised for the first time in a state habeas corpus application. On the contrary, the Fifth Circuit has long recognized a federal habeas petitioner's failure to comply with the Texas contemporaneous objection rule as an adequate and independent state procedural barrier to federal habeas review." *Id.* (citing numerous Fifth Circuit decisions upholding forfeiture based on noncompliance with Texas's contemporaneous objection rule).

Given the arguments of four CCA judges in its original habeas decision denying relief, Respondent's emphatic post-remand argument that the lack of contemporaneous objection compelled forfeiture of Petitioner's constitutional claim, and the extensive federal authority sustaining forfeiture based on noncompliance with Texas's contemporaneous objection rule, it is simply implausible for Respondent to now claim that the CCA's original refusal to default Petitioner's claim was anything other than a genuine assessment of the adequacy of Petitioner's objection. In such circumstances, the CCA's imposition of its "egregious harm" standard based on Petitioner's purported failure to make a contemporaneous objection amounts to nothing less than a reversal of its decision rejecting the default argument prior to the remand. The imposition of the "egregious harm" standard thus constitutes a belated effort to revisit a procedural ruling only because this Court reversed the merits of the CCA's federal constitutional analysis.

b. Contrary to Respondent's assertions, the CCA's harmless analysis in this case was aberrational, and its decision marks the first time since that the CCA has withheld *Penry* relief based on a finding of no harm.

Respondent seeks to characterize the CCA's decision as a routine application of Texas

harmless error law. *See* BIO at 29. In fact, the CCA's conclusion that Petitioner failed to establish the requisite harm, notwithstanding its view that Petitioner offered "extensive" mitigating evidence in support of defense counsel's compelling argument that Petitioner's life was "worth saving," 185 S.W.3d at 471-72, constitutes a remarkable departure from its prior approach to *Penry* claims and to its manner of assessing harm.

When this case was remanded to the CCA, the CCA had never once applied harmless error analysis to a *Penry* claim despite having granted relief in several cases.[5] Likewise, the CCA did not mention harmless error analysis in its numerous decisions denying *Penry* relief during the sixteen year interval between *Penry* and the remand in this case.[6] Particularly telling is the CCA's refusal to apply harmless error analysis in its sole reversal on *Penry II* nullification grounds immediately following this Court's decision in *Penry I*. *Rios v. State*, 846 S.W.2d 310, 317 (Tex. Crim. App. 1992).[7] In this respect, the CCA followed the lead of this Court, which neither applied nor mentioned harmless error analysis in *Penry I* or *Penry II*.[8]

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[5] *See, e.g., Ramirez v. State*, 815 S.W.2d 636 (Tex. Crim. App. 1991); *Ex parte Goodman*, 816 S.W.2d 383 (Tex. Crim. App. 1991); *Ex parte McGee*, 817 S.W.2d 77 (Tex. Crim. App. 1991); *Ex parte Williams*, 833 S.W.2d 150 (Tex. Crim. App. 1992).

[6] *See, e.g., Fuller (Tyrone) v. State*, 827 S.W.2d 919 (Tex. Crim. App. 1992); *Fuller (Aaron) v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992); *San Miguel v. State*, 864 S.W.2d 493 (Tex. Crim. App. 1993); *Robertson v. State*, 871 S.W.2d 701 (Tex. Crim. App. 1993); *Wheatfall v. State*, 882 S.W.2d 829 (Tex. Crim. App. 1994); *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995); *Mason v. State*, 905 S.W.2d 570 (Tex. Crim. App. 1995); *Heiselbetz v. State*, 906 S.W.2d 500 Tex. Crim. App. 1995); *Goff v. State*, 931 S.W.2d 537 (Tex. Crim. App. 1996).

[7] In *Rios*, the CCA found the special issues were inadequate to facilitate consideration of the defendant's low intelligence. The defendant's jury, like Petitioner's, had received a supplemental instruction, which the CCA characterized as "a clumsy attempt at jury nullification," 846 S.W.2d at 316, and the CCA ordered a new trial without applying harmless error analysis.

[8] Indeed, the absence of any harmless error analysis in *Penry II* is particularly revealing, because this Court did apply harmless error analysis in that decision to Penry's claim under *Estelle v. Smith*, 451 U.S. 454 (1981) (prohibiting use of uncounseled statements by defendant at the punishment phase that were obtained through state-appointed psychiatrist's post-arrest custodial interview with defendant), finding that Penry had not established that the admission of the challenged psychiatric report had a substantial and injurious effect on the verdict. 532 U.S. at 796. This Court's unwillingness to apply harmless error to the *Penry II* claim immediately after it had disposed of the *Estelle* claim on such grounds strongly implied that this Court viewed such analysis as inappropriate to claims involving jury nullification.

Only after the remand in this case did the CCA for the first time suggest that *Penry*-type error was amenable to harmless error analysis, *Penry v. State*, 178 S.W.3d 782 (Tex. Crim. App. 2005), though that case did not involve a nullification instruction. Moreover, the CCA refused to deny relief on harmless error grounds once it determined that the defendant had suffered "some" harm. *Id.* at 788.

Thus, the CCA, having consistently rejected harmless error for *Penry* claims prior to this remand, having determined that automatic reversal was mandated in context of a *Penry II* claim involving a "clumsy attempt at nullification," and having never applied its "egregious harm" test to a *Penry* claim of any sort, departed markedly on the heels of this Court's summary reversal in making Petitioner's case the first *Penry* claim ever to be subjected to its "egregious harm" standard.

Given this prior established practice, it is unsurprising that in its initial brief on remand, Respondent did not mention harmless analysis at all and insisted instead that the CCA should belatedly enforce a procedural default. Only after Petitioner had argued that harmless error analysis was inappropriate to jury nullification claims, and that in any event Petitioner's extensive mitigating evidence established harm, did Respondent urge the CCA to deem Petitioner's claim harmless. State's Reply Brief on Remand at 1 ("SRBR") (attached as Appendix 12). Even then, Respondent argued that the appropriate test of harm was whether "the error contributed to [Petitioner's] conviction or punishment." SRBR at 1 (citing *Fierro v. State*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1991)). Respondent did not mention, much less insist upon, the "egregious harm" test as the appropriate standard.[9] The fact that Respondent nowhere

[9] In such circumstances, Respondent's claim that Petitioner is somehow estopped from objecting to the CCA's

argued in favor of the "egregious harm" test further confirms that the CCA's decision to require "egregious harm" was not an ordinary application of state harmless error principles but the irregular imposition of a new and unprecedented burden in the wake of this Court's summary reversal.

CONCLUSION

The decision below rejects the core holding of *Smith* – that the nullification instruction precluded juror consideration of Petitioner's extensive mitigating evidence. The decision below also punishes Petitioner for his success in this Court by imposing a previously-rejected procedural obstacle and requiring an unprecedented degree of harm as a predicate for relief. For these reasons, this Court should grant certiorari to ensure compliance with its prior decision in this case and to preserve its role as the final arbiter of federal constitutional meaning.

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application of its "egregious harm" test because Petitioner did not specifically object to it below is simply bizarre. Neither party contemplated that the CCA would apply such a test, and, as Respondent concedes, BIO at 18, Petitioner plainly preserved the claim that Petitioner's extensive mitigating evidence precluded a finding of no harm on remand given this Court's decision. Petitioner cannot be faulted for failing to anticipate that the CCA would choose this case as the first and only occasion to demand a showing of "egregious harm" as a predicate for relief under *Penry I* or *Penry II*. Nor could Petitioner anticipate that the CCA would find no "egregious harm" by rejecting this Court's conclusion that jurors were unable to give adequate effect to Petitioner's mitigating evidence.

(2)

SEP 8 - 2006

No. 05-11304

IN THE

Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE CONSTITUTION PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Fallon, Richard, Jr., et al., *Hart and Wechsler's The Federal Courts and The Federal System* (5th ed. 2003) 13
Stern, Robert L., et al., *Supreme Court Practice* (8th ed. 2002) 5
Warren, Charles, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 (1930) 14
Warren, Charles, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1 (1913) 12, 13

IN THE

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LAROYCE LATHAIR SMITH,

Petitioner,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Amicus curiae The Constitution Project respectfully submits this brief in support of the petition for a writ of certiorari.[1]

INTEREST OF AMICUS CURIAE

The Constitution Project is a bipartisan non-profit organization that seeks solutions to contemporary constitutional issues through a combination of scholarship and public education. The Project's essential mission is to promote constitutional dialogue. To that end, it creates bipartisan blue-ribbon committees comprised of former government officials, judges, scholars, and other prominent citizens to reach across ideological and partisan lines. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and with ensuring that those guarantees are respected and enforced by all three branches of govern-

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this amicus brief have been submitted to the Clerk.

ment. More specifically, the Project recognizes this Court's role as the ultimate arbiter of the meaning of those constitutional guarantees.

In May 2000, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others. Although the Initiative does not take a position on the death penalty, it is concerned that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness. In 2006, the Initiative released an updated version of its 2001 report and consensus recommendations. *Mandatory Justice: The Death Penalty Revisited* describes 32 reforms that the committee believes are essential to reduce the risk of wrongful capital convictions and executions.

This Court's decision in *Smith* v. *Texas*, 543 U.S. 37 (2004), addressed and reinforced one of the most important procedural protections for capital defendants: the ability to present all relevant mitigating evidence to the jury and have the jury consider that evidence. Recommendations 26 and 27 in *Mandatory Justice* describe the Death Penalty Initiative committee's belief in the importance of mitigating factors in the jury's decision-making process. By disregarding the plain import of this Court's decision in *Smith*, the decision of the Texas Court of Criminal Appeals on remand threatens to eviscerate that essential protection. More broadly, it threatens this Court's authority as the final judicial arbiter of federal constitutional law. The Constitution Project therefore urges that the petition for certiorari be granted.

INTRODUCTION

In 1869, this Court reversed the Supreme Court of Missouri in a case involving a dispute over a parcel of land from the Louisiana Purchase. *Maguire* v. *Tyler*, 75 U.S. (8 Wall.) 650, 668 (1869). The Court found that the land in question had been granted by the Spanish governor to plaintiff John

Magwire's assignor, and had been properly confirmed by federal commissioners. *Id.* at 653-654, 660. On remand, the Missouri court conceded that this Court had decided the question of title in favor of Magwire, but refused to give effect to the judgment. *Magwire* v. *Tyler*, 47 Mo. 115, 125-126, 129 (1870). Instead, the court dismissed Magwire's action on a state-law ground that had not previously been raised. *Id.* at 126-128. On a second writ of error, this Court affirmed its jurisdiction and again reversed the Missouri court, explaining:

> State courts have no power to deny the jurisdiction of this court in a case brought here for decision and sent back with the mandate of the court, which is its judgment. . . . [I]t is clear that it was too late to raise any [additional] question after the whole case had been decided and the cause remanded for final judgment.

Tyler v. *Magwire*, 84 U.S. (17 Wall.) 253, 284-285 (1872).

As *Magwire* illustrates, throughout this nation's history, this Court has confronted cases in which a state or lower federal court has contravened this Court's direction—either openly or through evasive maneuvers such as those employed in *Magwire*. In such cases, this Court has repeatedly asserted its authority to protect the integrity of its mandate and, ultimately, the supremacy of federal law.

Here, once again, a state court has failed to heed this Court's dictates, and this Court should grant review to reaffirm that its decisions must be followed.

Petitioner LaRoyce Lathair Smith was convicted of capital murder in Dallas County, Texas. At sentencing, he presented evidence that he had learning disabilities and a low IQ; that his father was a violent drug addict; and that he was only nineteen when he committed the crime. The jury was instructed to answer two "special issues": whether the murder was deliberate, and whether the defendant was likely to be dangerous in the future. Under Texas law, affirmative answers to those two questions mandated the

death penalty. In an effort to comply with this Court's decision in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), the judge gave a supplemental "nullification" instruction directing the jury that it could respond to petitioner's mitigating evidence by answering "No" to one of the two special issues, even if the evidence otherwise required an affirmative answer. The jury answered "Yes" to both special issues and sentenced petitioner to death. The Texas Court of Criminal Appeals rejected petitioner's request for postconviction relief, reasoning that his mitigating evidence was not constitutionally significant and that the nullification instruction provided a sufficient vehicle for the jury to consider the evidence. *Ex parte Smith*, 132 S.W.3d 407, 413-417 (Tex. Crim. App. 2004); *see Smith* v. *Texas*, 543 U.S. 37, 37-38 (2004) (per curiam) (describing proceedings below).

This Court reversed the Texas Court of Criminal Appeals. *Smith* v. *Texas*, 543 U.S. 37. Finding that petitioner's evidence was relevant for mitigation purposes, it criticized the Texas court for failing to follow the "plain" meaning of the Court's precedent and for relying "on a test we never countenanced and now have unequivocally rejected." *Id.* at 45 (citing *Tennard* v. *Dretke*, 542 U.S. 274 (2004)). It held that the jury instructions at petitioner's trial were "constitutionally inadequate" because they did not allow jurors to give appropriate consideration to that mitigating evidence. *Id.* at 48. The Court explained that "petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And . . . the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Id.* It therefore reversed and remanded for further proceedings not inconsistent with its opinion. *Id.* at 48-49.

Yet, on remand, the Texas Court of Criminal Appeals disregarded this Court's analysis. It interjected a new procedural obstacle to Smith's federal claim—one that it had previously declined to impose—and it justified the applica-

tion of that obstacle by reverting to a line of reasoning that this Court had specifically rejected. *Ex parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006). It once again questioned the relevance of petitioner's mitigation evidence, *id.* at 464-466, and, applying the state's harmless error standard, concluded that the nullification instruction provided an adequate vehicle through which the jury could consider that evidence, *id.* at 468-472. The resulting decision not only is inconsistent with this Court's guidance on the precise question at issue: even more seriously, it undermines the constitutional authority of the Court.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Texas Court of Criminal Appeals, pursuant to Supreme Court Rule 16. In the alternative, the Court should grant plenary review and set the case for briefing and argument. It is critically important that this Court review the Texas court's decision, for two related reasons.

First, the decision of the Texas Court of Criminal Appeals contravenes this Court's opinion and mandate, disregarding the Court's carefully reasoned conclusions regarding the constitutional inadequacy of the jury nullification instruction. Summary reversal is appropriate to vindicate the concerns that warranted the Court's original grant of certiorari and to correct the Texas court's failure to heed this Court's clear direction. *See, e.g.*, *Sumner* v. *Mata*, 455 U.S. 591, 596-597 (1982) (granting certiorari and summarily vacating and remanding where the lower court "apparently misunderstood the terms of our remand" and reached a result inconsistent with the Court's prior opinion); Robert L. Stern et al., *Supreme Court Practice* 322 n.101 (8th ed. 2002) ("Summary reversal may . . . be grounded on the inherent power of the Court . . . to insure compliance with its own remand orders.").

Second, this Court should grant review, as it has done repeatedly throughout its history, to affirm its authority un-

der the Supremacy Clause to prevent state and lower federal courts from evading or frustrating its plain direction. Since the early days of the Republic, the Court's resolve when faced with state and lower court resistance to compliance with its mandates has been essential to maintaining its authority. Firmness is no less important in this instance.

I. THE TEXAS COURT OF CRIMINAL APPEALS' DECISION CONTRAVENES THIS COURT'S REASONED ANALYSIS IN *SMITH*

1. When this case was last here, the Court held unambiguously that the jury instructions at the penalty phase of petitioner Smith's trial were "constitutionally inadequate" because they disabled the jury from considering his extensive mitigating evidence. *Smith* v. *Texas*, 543 U.S. 37, 48 (2004) (per curiam). Nevertheless, the Texas Court of Criminal Appeals on remand applied its state harmless-error standard to reject petitioner's federal constitutional claim, on the theory that the jury instructions did in fact provide an adequate vehicle through which the jurors could consider petitioner's evidence. According to the court, the petitioner failed to show "egregious harm" because he failed "to provide any persuasive argument that the jury was unable to consider the totality of his extensive mitigating evidence." *Ex parte Smith*, 185 S.W.3d 455, 471 (Tex. Crim. App. 2006). In so holding, the court on remand disregarded this Court's specific findings and contravened the clear import of its decision in two critical ways.

First, the Texas court ignored this Court's finding that petitioner's mitigation evidence did not fit "within the scope of the special issues" in such a way that the jurors could properly consider and give effect to that evidence. *Smith*, 543 U.S. at 46 (quoting *Penry* v. *Johnson*, 532 U.S. 782, 799-800 (2001) (*Penry II*)); *see id.* at 47-48. Although the Texas court acknowledged that the "analytical framework" it had used in concluding that "the jury could fully address this evidence within the confines of the two special issues" had been repudiated by this Court in *Tennard* v. *Dretke*, 542

U.S. 274 (2004), it professed to be "uncertain whether the Supreme Court also concluded that some of the applicant's mitigation evidence was outside the reach of the two special issues, and, if so, exactly what evidence was beyond the ambit of those special issues." *Ex parte Smith*, 185 S.W.3d at 464; *see also id.* at 466.[2] Accordingly, it proceeded to "re-examine" petitioner's mitigation evidence and concluded that almost all such evidence was, in fact, "encompassed under the 'future dangerousness' special issue," with the remainder likely covered by deliberateness. *Id.* at 465-466; *see also id.* at 472.[3]

That reasoning flatly contradicts this Court's analysis. In *Smith*, this Court did *not* leave open the question whether the special issues fully encompassed petitioner's mitigation evidence. Rather, it made perfectly clear that the special issues were inadequate. After carefully reviewing the particular mitigation evidence in question, 543 U.S. at 41, 44-45, it concluded that, "[j]ust as in *Penry II*," the questions regarding "deliberateness and future dangerousness . . . had little, if anything, to do with the mitigation evidence petitioner presented," *id.* at 48. The jury instruction, including the special questions, was "constitutionally inadequate," *id.*, because it did not "empower the jury with a ve-

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[2] While repeatedly professing its uncertainty about this Court's holding regarding the special issues, *Ex parte Smith*, 185 S.W.3d at 464, 466-467, the Texas court elsewhere declared that "the Supreme Court did *not* address our conclusion that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence," *id.* at 463 (emphasis added) (internal quotations omitted). As discussed in text, this statement disregards this Court's plain holding that the special issues were inadequate to permit the jury to give effect to petitioner's evidence. *See Smith*, 543 U.S. at 47-48.

[3] The Texas court then purported to assume "for the sake of argument, that at least some of the applicant's evidence was not fully encompassed by the two special issues." *Ex parte Smith*, 185 S.W.3d at 466-467. Yet, even after this ostensible concession, the court insisted, at the close of its opinion, that it was merely "possible" that "the two special issues may not have fully and completely encompassed every single bit" of the evidence. *Id.* at 472.

hicle capable of giving effect to that evidence," *id.* at 45. In concluding otherwise, the Texas court ignored this Court's specific finding.

Second, the Texas Court of Criminal Appeals disregarded this Court's holding that the nullification instruction given to the jurors left them in an impermissible ethical dilemma. As this Court explained in *Smith*, it would have been "both logically and ethically impossible for a juror to follow both" the instructions relating to the special issues and the instructions relating to mitigating evidence. 543 U.S. at 46 (quoting *Penry II*, 532 U.S. at 799). "Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a 'true verdict.'" *Id.* (quoting *Penry II*, 532 U.S. at 800). Furthermore, for Eighth Amendment purposes, the jury instruction in *Smith* was indistinguishable from the one the Court had previously ruled unconstitutional in *Penry II*: "[T]he clearer instruction given to petitioner's jury did not resolve the ethical problem .... To the contrary, the mandatory language in the charge could possibly have intensified the dilemma faced by ethical jurors.... [T]he 'jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence.'" *Id.* at 47-48 (quoting *Penry II*, 532 U.S. at 801).

This Court thus held that, on these facts, the nullification instruction did not allow the jurors to give consideration and effect to the mitigating evidence. But, on remand, the Texas Court of Criminal Appeals did not heed that conclusion. Although it paid lip-service to the Court's conclusion that "the nullification instruction intensified the dilemma faced by ethical jurors in this case," it went on to dismiss the ethical dilemma as a mere "possibility," insufficiently real to warrant granting petitioner a new penalty trial. *Ex parte Smith*, 185 S.W.3d at 468 (internal quotations omitted). According to the Texas Court, there was no "actual" ethical dilemma because neither the jurors, the parties, nor the trial judge noted one, and during voir dire the jurors "[o]verwhelmingly . . . agreed" that they understood and

could follow the nullification procedure. *Id.* Moreover, "the prosecutor never suggested that the jury should ignore or fail to consider any of [petitioner's] mitigation evidence," *id.* at 471, and "[a]ll of [petitioner's] mitigating evidence was admitted, defense counsel did a superb job of weaving all of that evidence into a compelling theory of the case, and his attorneys presented a strong, coherent, and persuasive closing argument on punishment," *id.* at 472.

None of the factors on which the Texas court relied can justify its disregard of this Court's express holding that, on these facts, the nullification instruction was constitutionally inadequate. The Texas court's reliance on jurors' statements during voir dire ignores this Court's holding that, by its very nature—even if jurors clearly understood it—the nullification instruction placed jurors in an intractable bind: it would have been "logically and ethically impossible" to comply both with the nullification instruction and their oath to render a true verdict on the special issues. *Smith*, 543 U.S. at 46 (quoting *Penry II*, 532 U.S. at 799). The notion that the prosecutor's closing mitigated this dilemma contradicts this Court's finding that the prosecutor heightened the jurors' ethical dilemma when he "reminded the jury that each and every one of them had promised to 'follow the law' and return a 'Yes' answer to the special issues so long as the State met its burden of proof." *Id.* at 48 n.5. And the Texas court's assertion that petitioner suffered no egregious harm from the deficient instructions because he presented a "compelling" and "persuasive" case on mitigation gets it precisely backwards: as this Court recognized, petitioner was harmed *because* he presented powerful mitigating evidence and the jury had no adequate vehicle to give effect to that evidence.

As this Court explained in *Tennard*, "the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." 542 U.S. at 285 (internal quotations omitted); *see also Penry II*, 532 U.S. at 797. State and lower courts may not evade this principle by imposing a "restrictive gloss" on the Court's precedent. *See Tennard*, 542 U.S. at 283. But that is exactly

what the Texas court did here, undermining this Court's repeated holdings regarding the relevance of mitigation evidence and the inadequacy of the nullification instruction.

2. The Texas Court of Criminal Appeals' invocation of state harmless-error law does not authorize or excuse its failure to abide by this Court's decision. According to the Texas court, application of the "egregious harm," rather than "some harm," standard was appropriate because petitioner failed to raise his claim of jury-charge error at the trial level. *See Ex parte Smith*, 185 S.W.3d at 463-464, 468 (citing *Almanza* v. *State*, 686 S.W.2d 157 (Tex. Crim. App. 1984)). Yet, the Texas Court of Criminal Appeals had twice before rejected the argument that petitioner failed to preserve his jury charge claim, and had previously addressed the merits of the claim without imposing any procedural barriers. *See Smith* v. *State*, No. 71,333 (Tex. Crim. App. June 22, 1994); *Ex parte Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004).[4] Indeed, this Court, when first reversing the Texas court, expressly noted that the majority had declined to find petitioner's claim procedurally defaulted and had instead decided it on the merits. *Smith*, 543 U.S. at 43 n.3. Only after the Texas Court of Criminal Appeals received an unfavorable ruling on the merits from this Court did it devise a theory of unpreserved error.

This Court has repeatedly refused to permit state courts to apply a state-law procedural ground for the first time on remand in order to evade this Court's rulings on a question of federal constitutional law. *See, e.g.*, *NAACP* v.

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[4] In any event, there is no basis for the Texas court's contention that petitioner failed to raise his objection to the jury instructions in a timely fashion. In fact, as the court itself acknowledged, petitioner made a timely claim that the special issues failed to permit full consideration of his mitigating evidence, and in doing so he explicitly invoked *Penry I*. *Ex parte Smith*, 185 S.W.3d at 461 n.8. Petitioner's objection was clearly sufficient to apprise the trial court of his federal constitutional claim. *See id.* at 475-476 (Holcomb, J., dissenting). "[T]he majority's reasoning that petitioner did not preserve error cannot be countenanced, and further, it is not supported by the record." *Id.* at 475.

Alabama ex rel. Patterson, 360 U.S. 240, 244-245 (1959) (citing *Sibbald* v. *United States*, 37 U.S. (12 Pet.) 488, 492 (1838)); *Tyler* v. *Magwire*, 84 U.S. (17 Wall.) 253, 284-285 (1872). Nor can courts inconsistently employ a state procedural rule as a means to thwart this Court's review. *See, e.g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 456, 457-458 (1958).

Moreover, even assuming that the Texas Court of Criminal Appeals could, at this late date, invoke the state's "egregious harm" standard to deny petitioner relief, under no circumstances could it apply the standard in a way that contravenes the essential holding of this Court. Yet, that is precisely what the Texas court did here. It reasoned that petitioner suffered no egregious harm *because* the jury was able to consider most, if not all, of the evidence. *Ex parte Smith*, 185 S.W.3d at 471-472. The Texas court's harmless-error ruling was therefore premised on its judgment that the special questions and nullification instruction together provided an adequate vehicle for the jurors to give effect to the mitigation evidence—a judgment that directly conflicts with this Court's holding. *See Smith*, 543 U.S. at 38, 48.[5]

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[5] The concurring opinion's assertion that the egregious harm standard constitutes an independent and adequate state-law ground and therefore deprives this Court of jurisdiction is without merit. *See Ex parte Smith*, 185 S.W.3d at 472-473 (Hervey, J., concurring). A state-law ground is not independent where it is either "interwoven" with the federal ground "or is not of sufficient breadth to sustain the judgment without" the use of federal law. *Michigan* v. *Long*, 463 U.S. 1032, 1039 n.4 (1983) (quoting *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917)). The Texas court's conclusion that petitioner failed to show egregious harm was necessarily "interwoven" with federal constitutional law because the error being assessed—by whatever standard—was federal constitutional error. And, as explained above, the Texas court's conclusion that the federal constitutional error at issue failed to meet an egregious-harm standard was entirely dependent on an analysis of the effects of that error that revisited and distorted the analysis previously conducted by this Court. As a result, it cannot be considered an independent state-law ground. *See Oregon* v. *Guzek*, 126 S. Ct. 1226, 1229-1230 (2006) (no independent ground where state court relied upon Supreme Court mitigation precedents to determine admissibility of evi-

II. THIS CASE MERITS THE SAME TREATMENT AS PAST CASES IN WHICH THIS COURT HAS REVERSED STATE COURTS THAT ATTEMPTED TO THWART ITS MANDATES

Over the course of the last two hundred years, this Court has often granted review of state and lower federal court decisions that have thwarted, evaded, or simply misapprehended its mandates, in order to reaffirm its authority "to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958). The Court should do the same here.

1. When the Court was first established in 1790, it was by no means settled that its judgments would be respected as binding on state courts. Indeed, in the early years of the Republic, state courts repeatedly resisted this Court's authority to review their judgments on matters of federal law. *See* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1,

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dence); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993) (no independent or adequate ground where state law holding "rested solely" on a failure properly to apply federal law); *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law . . . .").

Moreover, even if the "egregious harm" standard were an "independent" ground, it would not be an "adequate" ground. Procedural rules that are applied inconsistently, as in this case, will not divest this Court of jurisdiction. *See James* v. *Kentucky*, 466 U.S. 341, 348-349 (1984) (only "firmly established and regularly followed state practice . . . can prevent implementation of federal constitutional rights"); *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964) (state procedural rules "not strictly or regularly followed" may not bar review); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. at 457-458 ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."). Here, as Justice Holcomb explained in dissent, the Texas court applied its preservation of error rule "capriciously and arbitrarily" to deny relief to petitioner despite his objection at trial that the jury instructions failed to comply with *Penry I*, and despite its previous decisions to address petitioner's claim on the merits. *Smith*, 185 S.W.3d at 477-478.

161 (1913); Richard Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 479-480 (5th ed. 2003). Only as a result of this Court's resolve in the face of state-court resistance was its supremacy in matters of federal law established.

In the most notorious dispute of this Court's early years, Virginia's highest court refused to acknowledge the authority of the Court to review a decision construing the effect of a post-Revolutionary War treaty on the rights of two purported landowners. *See Hunter* v. *Fairfax's Devisee*, 15 Va. (1 Munf.) 218 (1810), *vacated*, *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813), *remanded to Hunter* v. *Martin*, 18 Va. (4 Munf.) 1 (1815), *rev'd*, *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). According to the Virginia court, section 25 of the Judiciary Act,[6] which conferred upon this Court the authority to exercise appellate jurisdiction over state courts, was unconstitutional. *Hunter*, 18 Va. at 58-59. Thus, the state court refused to follow this Court's express instructions to enter judgment for the devisee of the British subject whose land had been confiscated in violation of a federal treaty. *Id.* In response, this Court did not yield; instead, it issued another decision affirming its authority and renewed its order to the Virginia court to comply with its first mandate. *Martin*, 14 U.S. 304. As the Court made clear, its final judgments are "conclusive upon the parties, and [cannot] be re-examined" either by the Court itself or by state courts. *Id.* at 355.

In the years following *Martin*, as state courts continued to resist this Court's judgments, the Court repeatedly made clear that its decisions on matters of federal law were binding and must be followed. *See* Warren, *supra*, at 12-22, 25, 161-162, 129-186 (detailing state-court resistance to the Court's authority); *see also Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (reaffirming the authority of the Court to review state-court judgments). For example, the Court repeatedly reversed state courts that issued writs of manda-

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[6] Judiciary Act of 1789, 1 Stat. 73, 85 (1789).

mus and habeas corpus to federal officials, or that tried to prevent the execution of federal writs. *See* Charles Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 350-356 (1930); *see also M'Clung* v. *Silliman*, 19 U.S. (6 Wheat.) 598 (1821) (states have no right to issue a writ of mandamus to a federal official); *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166, 195 (1867) (states lack "all power to restrain either the process or proceedings in the national courts"). As the Court declared in *Amy* v. *Desmoines County Supervisors*, if state courts had the power to prevent the execution of a federal writ of mandamus, "the Constitution of the United States, and the laws made in pursuance thereof . . . would be subordinated to the authority of the courts of every State in the Union." 78 U.S. (11 Wall.) 136, 138 (1870).

In a case involving the Fugitive Slave Act,[7] the Court acted no less than four times in order to stop the Supreme Court of Wisconsin from discharging a federal prisoner in violation of this Court's mandate. *Ableman* v. *Booth*, 62 U.S. (21 How.) 506, 513-525 (1859), *reversing In re Booth*, 3 Wis. 1 (1854), *Ex parte Booth*, 3 Wis. 145 (1854). The Court made clear in its final judgment in the case that

> no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a State court where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the State.

Id. at 525; *accord Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872).

2. As a result of these repeated exertions during the early years of the Republic, this Court's authority to review state-court judgments on matters of federal law was, by the

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[7] The Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

twentieth century, firmly established. Nonetheless, on numerous occasions during the last century, state courts, as well as lower federal courts, have ignored, evaded, or misapplied this Court's mandates and its guidance regarding the proper application of federal law. The cases cover a wide array of legal issues, from the federal constitutional rights of criminal defendants, *see, e.g.*, *Miller-El* v. *Dretke*, 125 S. Ct. 2317 (2005), to a corporation's right to assert in a federal forum its entitlement to arbitration, *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (per curiam). And the lower and state court decisions at issue have ranged from the overtly disobedient, *see, e.g.*, *Deen* v. *Hickman*, 358 U.S. 57 (1958) (per curiam), to the covert, devious, or simply wrongheaded, *see, e.g.*, *NAACP* v. *Alabama ex rel. Patterson*, 360 U.S. at 244-245. Yet, whatever the legal issue or the manner of the lower courts' failure to abide by this Court's decisions, this Court has taken decisive action to protect the integrity of its mandates and to affirm its authority as the ultimate arbiter of federal law.

The maneuvers used by the Texas Court of Criminal Appeals to evade this Court's decision in *Smith* bear a striking resemblance to tactics of resistance that the Court has repeatedly discountenanced in the past. On numerous occasions, courts have applied new procedural grounds on remand—as the Texas court did here—in order to reinstate a ruling this Court had set aside. For example, in *NAACP* v. *Alabama ex rel. Patterson*, this Court reversed a decision of the Supreme Court of Alabama that upheld a judgment of civil contempt against the NAACP for failing to comply with a court order to reveal the names of its members. 357 U.S. 449, 467 (1958). On remand, the state court acknowledged this Court's holding, but then proceeded to re-institute its contempt order on a new ground, based on a different view of the record. *Ex parte NAACP*, 268 Ala. 531, 532-533 (1959). On certiorari, this Court again reversed, explaining that the state court could not employ a new rationale on remand to evade the Court's mandate. *NAACP* v. *Alabama ex rel. Patterson*, 360 U.S. at 244-245 (quoting *Sibbald*, 37

U.S. (12 Pet.) at 492); *see also Tyler* v. *Magwire*, 84 U.S. (17 Wall.) at 284-285.

Similarly, in *Sullivan* v. *Little Hunting Park, Inc.*, this Court vacated and remanded a decision of the Virginia Supreme Court of Appeals holding that petitioner's failure to comply with a state procedural requirement barred review of his racial discrimination claim. 392 U.S. 657 (1968). On remand, the Virginia court again asserted that the state procedural ground barred review of petitioner's claim. 209 Va. 279, 281 (1968). Faced with that attempt to evade the import of its prior ruling, this Court again granted review and reversed. 396 U.S. 229, 232, 234 (1969). More recently, in *Ford* v. *Georgia*, the Court vacated and remanded a decision of the Georgia Supreme Court rejecting the petitioner's claim of discriminatory jury selection. 479 U.S. 1075 (1987). On remand, the Georgia court for the first time held that petitioner's claim was procedurally barred. 257 Ga. 661, 663-664 (1987). Rather than permit the Georgia court thus to avoid the effect of its prior decision, this Court granted certiorari and reversed. 498 U.S. 411, 424-425 (1991).[8]

The Texas Court of Criminal Appeals engaged in similar sleight-of-hand here. When petitioner's case was first before the Texas court, the State argued that his claim was procedurally barred, but the majority declined to rule on that ground and instead addressed the merits; nowhere did the majority intimate that petitioner had failed to raise his claim in a timely fashion. *See Smith*, 543 U.S. at 43 n.3; *Ex parte Smith*, 132 S.W.3d at 410; *cf. Ex parte Smith*, 132 S.W.3d at 423 (Hervey, J., concurring). Rather, it was only after receiving an unfavorable decision on the merits from this Court that the Texas court first invoked petitioner's pur-

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[8] The Court held in both *Sullivan* and *Ford* that the purported state-law ground of decision did not deprive this Court of jurisdiction because the state court had not consistently applied it and it therefore was not an adequate state ground. *See Sullivan*, 396 U.S. at 234; *Ford*, 498 U.S. at 423-424. In this case, as demonstrated above, *see supra* n.5, the purported state-law ground for the Texas court's decision is neither independent nor adequate.

ported untimeliness to deny relief. This Court has repeatedly refused to permit state courts to evade its rulings by manipulating state procedural law in this manner.

In other cases, the Court has reversed state or lower federal courts a second time when, on remand, they refused to accept that the Court meant what it said initially. *See, e.g., General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (per curiam) (involving entitlement to arbitration); *Stanton* v. *Stanton*, 429 U.S. 501 (1977) (per curiam) (involving sex discrimination in Utah family-law statute); *Deen* v. *Hickman*, 358 U.S. 57 (1958) (per curiam) (involving sufficiency of evidence to support a jury award in a Federal Employers Liability Act case). The Court has made clear that it is not enough to pay lip service to its rulings while disregarding them in substance; the court to which this Court remands a case must respect the "thrust" of the Court's decision. *See Stanton*, 429 U.S. at 503. Accordingly, this Court has not only corrected instances of outright disobedience, where the state court does "precisely what [the Court] held that it lacked the power to do," *Felter*, 436 U.S. at 496, or undertakes "its own independent evaluation of the evidence . . . wholly apart from the judgment of the Supreme Court," *Deen*, 358 U.S. at 57; it has also refused to allow state and lower courts to evade its judgments on remand based on an unduly narrow reading of this Court's case law, or on implausible distinctions between the facts of their cases and the precedents upon which a remand order was based.

In *Henry* v. *City of Rock Hill*, for example, this Court vacated and remanded a decision of the South Carolina Supreme Court that upheld the criminal convictions of individuals peacefully "assembled . . . in front of the City Hall to protest segregation." 376 U.S. 776, 777 (1964) (per curiam) (describing prior decision in 375 U.S. 6 (1963)). On remand, the state court purported to comply with this Court's mandate. *City of Rock Hill* v. *Henry*, 135 S.E.2d 718, 718-719 (S.C. 1963). Yet, much like the Texas Court of Criminal Appeals in *Smith*, the court professed uncertainty about the true meaning of the Court's precedent and adopted an un-

duly narrow reading of the case law. *Id.* at 718-720; *cf. Ex parte Smith*, 185 S.W.3d at 464, 466-467, 469-472 (misstating and dramatically narrowing this Court's holding in *Smith*). Then, after unpersuasively distinguishing the facts of its case from the precedent upon which remand was based, the court concluded that its original judgment should stand. *Henry*, 135 S.E.2d at 719-720; *cf. Ex parte Smith*, 185 S.W.3d at 469-472.[9]

This Court again granted certiorari and reversed. *Henry*, 376 U.S. at 778. In a terse opinion, the Court made clear that such manipulation of its precedent would not be countenanced. As the Court explained, "under the Supremacy Clause," Supreme Court decisions are "binding upon state courts as well as upon federal courts," and although the Court's remand order "did not amount to a final determination on the merits," it did "indicate that we found [prior precedent] sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Id.* at 777. In short, a state court cannot pay lip service to the mandate, while evading its clear import.[10]

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[9] The state court acknowledged "the power and authority of the United States Supreme Court to reverse a State conviction for proper reasons or grounds based on the provisions of the Federal Constitution," *City of Rock Hill* v. *Henry*, 135 S.E. 2d 718, 718 (S.C. 1963), and it claimed it was "endeavor[ing] to carry out the mandate of the United States Supreme Court," *id.*; *see also id.* at 719. Yet, the court found "that the light, if any, shed upon [the] instant case by the [Supreme Court's earlier] case is not readily or easily discernible," *id.* at 718. Just as the state court in *Smith* concluded that *Penry II* presented more egregious facts than the instant case, 185 S.W.3d at 472, the *Henry* court explained: "We have reviewed the facts in this case, which we find more aggravated than those in the . . . case [upon which remand was based], and conclude that there is nothing in th[at] . . . case to require a reversal of [the] instant case," *Henry*, 135 S.E.2d at 720.

[10] Two reversals were also necessary before the Florida Supreme Court complied with the mandate of the Supreme Court in *Chamberlin* v. *Dade County Board of Public Instruction*, 374 U.S. 487 (1963). On the first grant of certiorari, the Court vacated the state court's decision, which had upheld various religious exercises in public schools, and remanded for reconsideration in light of two recent decisions. *Id.* at 487. On

Similarly, a state court's assertion that it has "acquiesc[ed]" in this Court's conclusion will be rejected when the state court applies the wrong harmless-error standard or misreads the record to which the standard is applied. *See Yates* v. *Aiken*, 500 U.S. 391, 399 (1991). Furthermore, an opinion that is only partially "responsive" to this Court's mandate will not stand. *See Yates* v. *Aiken*, 484 U.S. 211, 214 (1988) (granting certiorari because state court had not "fully complied" with the mandate). And, a state court cannot, as a means to evade this Court's mandate, use state law where the application of federal law is required: "The Supremacy Clause does not allow a federal retroactivity doctrine to be supplanted by invocation of a contrary approach to retroactivity under state law." *See Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993) (reversing where state court failed to apply federal retroactivity doctrine when applying the Court's decision regarding preferential tax benefits for state and local government employees).

The Court has applied the same principles when reviewing decisions by lower federal courts. Like state courts, lower federal courts may not fall short in their "attention to [this Court's] explanation of the governing legal standards." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999). Nor may they engage in "dismissive and strained interpretation" of evidence or case law to evade the clear guidance of this Court. *Miller-El*, 125 S. Ct. at 2339; *see also Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 847-849 (1986) (reversing Court of Appeals for second time where appellate court read precedent unduly narrowly). In short,

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remand, the Florida state court, like the Texas court in *Smith*, purported to "read with care" the Supreme Court decisions cited in the remand order. 160 So. 2d 97, 98 (Fla. 1964). But it went on to critique the precedent as providing no "clear course for [the state courts] to follow," to distinguish its case from the Court's precedent, and to reach the same conclusion it had reached the first time it heard the case. *Id.* at 99. The Court again granted certiorari and reversed and remanded. 377 U.S. 402, 402 (1964) (reversing in part and dismissing in part). Only when the Florida Supreme Court considered the case for the third time did it comply with the Supreme Court's mandate. *See* 171 So. 2d 535, 538 (Fla. 1965).

this Court's cases over the last two hundred years have made clear that, whether state or federal, all lower courts must respect the integrity of this Court's mandates and the authority of this Court "to say what the law is." *Marbury*, 5 U.S. at 177.

Yet, that is precisely what the Texas Court of Criminal Appeals failed to do. Instead of following this Court's reasoned analysis, the Texas court concocted a new state-law procedural barrier it had previously declined to employ. It then ignored the specific findings of this Court and adopted an unduly narrow construction of the Court's holding, in order to reinstate the same result that this Court had previously rejected as inconsistent with the Eighth Amendment's dictates. The Texas court's decision thus undermines this Court's authority and contravenes its plain direction. This Court should reaffirm that it meant what it said in *Smith* and that state and lower courts must respect its decisions.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Texas Court of Criminal Appeals should be summarily reversed. In the alternative, the Court should grant plenary review and set this case for briefing and argument.

Respectfully submitted,

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No. 05-11304

In The Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

BRIEF OF THE HONORABLE JOHN J. GIBBONS, THE HONORABLE TIMOTHY K. LEWIS, THE HONORABLE ABNER J. MIKVA, AND THE HONORABLE WILLIAM A. NORRIS, FORMER JUDGES OF THE UNITED STATES COURTS OF APPEALS, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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The Honorable John J. Gibbons, the Honorable Timothy K. Lewis, the Honorable Abner J. Mikva, and the Honorable William A. Norris, submit this *amicus curiae* brief in support of the petitioner, LaRoyce Lathair Smith.[1]

INTEREST OF AMICUS CURIAE

This amicus curiae brief is submitted by former judges of the United States Courts of Appeals, who maintain an active interest in the fair and effective functioning of the criminal justice system.[2] *Amici* are concerned about the important issues presented in this case regarding judicial administration and federalism, and submit this brief to urge this Court to grant review to reaffirm that lower courts, on remand, must comply with

[1] No counsel for a party authored this brief in whole or in part. The Texas Defender Service made a monetary contribution to pay some of the costs of printing this brief but, other than that no person or entity other than amicus and their counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of amicus briefs have been submitted to the Clerk.

[2] The Honorable John J. Gibbons served as a judge of the United States Court of Appeals for the Third Circuit from 1970 to 1987, and as Chief Judge of that court from 1987 to 1990. The Honorable Timothy K. Lewis served as a judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999, and of the United States District Court of the Western District of Pennsylvania from 1991 to 1992. The Honorable Abner J. Mikva served as a judge of the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and as Chief Judge of that court from 1991 to 1994. He also served as White House Counsel from 1994 until 1995. Prior to his judicial career he was a five term member of Congress, and a five term member of the Illinois House of Representatives. The Honorable William A. Norris served as a judge of the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

this Court's mandates and must not invent new procedural obstacles to avoid compliance. Although there are other issues presented in the petition, this brief focuses on the central feature of the case: the lower court's resistance to implementation of this Court's mandate. The manifestation of that resistance – the creation and application of a harmless error analysis that had never before been applied in this case or context – is the focus of this brief. Amicus curiae care deeply that constitutional guarantees – particularly in death penalty cases, where they must be protected with particular zeal – are enforced. What the state court has done in this case is flout this Court's interpretation of those guarantees. Such an action should not be permitted to stand, for it undermines the Constitution, our federal system, and this Court's role in the enforcement of limits imposed by both.

The issues presented by this case are therefore of vital importance to attorneys who care deeply about these issues, and have played a central role in the administration of justice.

FACTS AND PROCEDURAL HISTORY

In 1991, LaRoyce Smith was convicted of murdering one of his former co-workers at a Taco Bell in Dallas County, Texas. The State sought the death penalty and at the penalty phase, Smith's attorney presented as mitigating circumstances evidence that Smith had learning disabilities and a low IQ; that his father was a violent drug addict; and that he was only nineteen when he committed the crime.

The jury was instructed on two special issues: first, whether the killing was deliberate; and second, whether the defendant posed a continuing danger to others. Under Texas law, affirmative answers to those two questions mandated the death penalty.

Two years prior to Smith's trial, this Court held that presenting only these two special issues, without additional instructions regarding the jury's duty to consider mitigation evidence, violated the Eighth Amendment. *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (*Penry I*). Shortly after Smith's trial, the Texas Legislature amended its capital sentencing scheme to require juries to take "into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant" in deciding whether there are sufficient mitigating circumstances to warrant a sentence of life imprisonment rather than a death sentence. Tex. Code Crim. Proc. Ann., Art. 37.071(2)(e)(1) (Vernon Supp.2001).

Smith, however, did not receive the benefit of the new statutory instruction at his trial. Instead, just as in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), Smith was sentenced pursuant to a supplemental instruction provided to the jury by the trial judge. The judge gave a supplemental "nullification" instruction directing the jury that it could respond to Smith's mitigating evidence by answering "No" to one of the two special issues, even if the evidence otherwise required an affirmative answer.

As this Court explained when this case was before it previously:

> The jury verdict form tracked the final reminders the prosecution gave the jury. The form made no mention of nullification. Nor did it say anything

> about mitigation evidence. Instead, the verdict form asked whether Smith committed the act deliberately and whether there was a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. The jury was allowed to give 'Yes' or 'No' answers only. The jury answered both questions 'Yes' and sentenced petitioner to death.

Smith v. Texas, 543 U.S. 37, 42 (2004).

The Texas Court of Criminal Appeals rejected Smith's request for postconviction relief, reasoning that his mitigating evidence was not constitutionally significant and that the nullification instruction provided a sufficient vehicle for the jury to consider the evidence. *Ex parte Smith*, 132 S.W.3d 407, 413-417 (2004).

This Court, in a *per curiam* opinion, reversed the Texas Court of Criminal Appeals. *Smith v. Texas*, 543 U.S. 37 (2004). The Court concluded that Smith's evidence was relevant for mitigation purposes. It criticized the Texas court for failing to follow the "plain" meaning of the Court's precedent and for relying "on a test we never countenanced and now have unequivocally rejected." *Id.* at 45 (citing *Tennard v. Dretke*, 542 U.S. 274 (2004)). The Court held that the jury instructions at petitioner's trial were "constitutionally inadequate" because they did not allow jurors to give appropriate consideration to that mitigating evidence. *Id.* at 48. The Court noted that "[t]here is no question that a jury might well have considered petitioner's IQ scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death." Thus the Court declared, "[i]ndeed, we have held that a defendant's IQ score of 79, a score slightly higher than petitioner's, constitutes relevant mitigation evidence." *Id.* at 44. The Court explained that

"petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence." As the Court explained, "the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Id.*

This Court's conclusion could not have been clearer:

> There is no principled distinction, for Eighth Amendment purposes, between the instruction given to petitioner's jury and the instruction in *Penry II*. Petitioner's evidence was relevant mitigation evidence for the jury under *Tennard* and *Penry I*. We therefore hold that the nullification instruction was constitutionally inadequate under *Penry II*.

Id. at 48. The Court therefore reversed and remanded for further proceedings not inconsistent with its opinion. *Id.* at 48-49.

Yet, on remand, the Texas Court of Criminal Appeals disregarded this Court's analysis, refused to consider the permissibility of the jury instructions, and reaffirmed the death sentence. The Texas Court of Criminal Appeals interjected a new procedural obstacle to Smith's federal claim: harmless error analysis. *Ex parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006). The court again, as it did before this Court's decision, questioned the relevance of petitioner's mitigation evidence, *id.* at 464-466, and concluded that the nullification instruction provided an adequate vehicle through which the jury could consider that evidence. *Id.* at 468-472.

In other words, the Texas Court of Criminal Appeals upheld exactly the instructions which this Court, in this case and others, has deemed to be an insufficient basis for

imposing a death sentence. The resulting decision not only is inconsistent with this Court's guidance on the precise question at issue, but even more seriously, it undermines the constitutional authority of this Court for a state court to so blatantly disregard its mandate.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE CONCERNING THE OBLIGATION OF STATE COURTS TO COMPLY WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

A. The Texas Court Of Criminal Appeals Acted In Disregard Of This Court's Decision And Mandate.

This Court could not have been clearer or more emphatic in its earlier *per curiam* opinion in this case: the instructions to the jury were constitutionally defective under clearly established law as articulated by this Court in cases such as *Penry I*, *Penry II*, and *Tennard*. The mandate from this Court was "for further proceedings not inconsistent with this opinion." 543 U.S. at 49.

The Texas Court of Criminal Appeals, however, ignored this mandate and created a new procedural bar, one that it rejected earlier, harmless error analysis. According to the court, Smith failed to show "egregious harm" because he failed "to provide any persuasive argument that the jury was unable to consider the totality of his extensive mitigating evidence." *Ex parte Smith*, 185 S.W.3d at 471. The court reexamined Smith's mitigation evidence, and concluded that almost all such evidence was, in fact, "encompassed under the 'future dangerousness'

special issue," with the remainder likely covered by deliberateness. *Id.* at 465-466; *see also id.* at 472.

But this was inconsistent with this Court's express conclusion that Smith's mitigation evidence did not fit "within the scope of the special issues" in such a way that the jurors could properly consider and give effect to that evidence. *Smith*, 543 U.S. at 47-48 (quoting *Penry II*, 532 U.S. at 799-800). After carefully reviewing the instructions and the mitigation evidence, this Court stated: "Just as in *Penry II*," the questions regarding "deliberateness and future dangerousness . . . had little, if anything to do with the mitigation evidence petitioner presented." 543 U.S. at 47.

Despite this express holding, the Texas Court of Criminal Appeals nonetheless found that the jury's instructions were constitutionally adequate. Moreover, the Texas Court of Criminal Appeals disregarded this Court's holding that the nullification instruction given to the jurors placed them in an impermissible ethical dilemma. As this Court explained in *Smith*, it would have been "both logically and ethically impossible for a juror to follow both" the instructions relating to the special issues and the instructions relating to mitigating evidence. 543 U.S. at 46 (quoting *Penry II*, 532 U.S. at 799). "Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a 'true verdict.'" *Id.* (quoting *Penry II*, 532 U.S. at 800).

Furthermore, for Eighth Amendment purposes, the jury instruction in *Smith* was indistinguishable from the one the Court had previously ruled unconstitutional in *Penry II*. This Court stated:

> [T]he clearer instruction given to petitioner's jury did not resolve the ethical problem. . . . To the contrary, the mandatory language in the charge could possibly have intensified the dilemma faced by ethical jurors. . . . [T]he jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence.

543 U.S. at 48 (internal quotations omitted).

This Court thus expressly held that the nullification instruction did not allow the jurors to give consideration and effect to the mitigating evidence. But, on remand, the Texas Court of Criminal Appeals dismissed the ethical dilemma as a mere "possibility," insufficiently real to warrant granting Smith a new penalty trial. *Ex parte Smith*, 185 S.W.3d at 468 (internal quotations omitted).

It is simply impossible to reconcile the Texas Court of Criminal Appeals' decision with this Court's holding and mandate. This Court found that the jury instructions were not a constitutionally permissible basis for imposing a death sentence, but the Texas Court of Criminal Appeals, on remand, came to exactly the opposite conclusion.

B. The Texas Court Of Criminal Appeals Created A New Procedural Bar To Thwart Compliance With This Court's Decision.

On remand from this Court, the Texas Court of Criminal Appeals said that the appropriate standard for determining harmless error was whether there was "egregious harm," rather than "some harm," because Smith failed to adequately raise his claim of jury-charge error at the trial level. *See Ex parte Smith*, 185 S.W.3d at 463-64, 468 (citing *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984)).

But the Texas Court of Criminal Appeals had twice before rejected the argument that Smith failed to preserve his jury charge claim, and had previously addressed the merits of the claim without imposing any procedural barriers. *See Smith v. State*, No. 71,333 (Tex. Crim. App. June 22, 1994); *Ex parte Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004).

In fact, this Court, when first reversing the Texas court, expressly noted that the Texas court had declined to find Smith's claim procedurally defaulted and had instead decided it on the merits. *Smith*, 543 U.S. at 43 n.3. Only after the Texas Court of Criminal Appeals received an unfavorable ruling on the merits from this Court did it devise a theory of unpreserved error and impose a new procedural bar: requiring Smith to show that there was an egregious error. The conclusion is inescapable that it did so solely to avoid compliance with this Court's mandate and to prevent further review by this Court.

The Texas Court's application of a heightened standard of "egregious harm" is entirely unprecedented – it has *never* before been applied by the Texas Court in the analysis of the merits of a *Penry* claim. Indeed, this is the *first* case where the Texas Court has *ever* denied relief based on harmless error analysis. It was not until 2005 – after this Court's remand in this case – that the Texas Court of Criminal Appeals applied harmless error in granting relief in its review of the *Penry* claim before it in *Penry v. State*, 178 S.W.3d 782 (Tex. Crim. App. 2005). Of the few previous cases in which *Penry* relief was granted, harmless error analysis is entirely absent. *See, e.g., Ramirez v. State*, 815 S.W.2d 636 (Tex. Crim. App. 1991); *Ex parte Goodman*, 816 S.W.2d 383 (Tex. Crim. App. 1991); *Ex parte McGee*, 817 S.W.2d 77 (Tex. Crim. App. 1991); *Ex parte Williams*, 833

S.W.2d 150 (Tex. Crim. App. 1992); *Rios v. State*, 846 S.W.2d 310 (Tex. Crim. App. 1992).[3] The numerous *Penry* claims denied by the Texas Court of Criminal Appeals between 1989 and 2005 are equally devoid of any discussion of harmless error. *See, e.g., Fuller (Tyrone) v. State*, 827 S.W.2d 919 (Tex. Crim. App. 1992); *Fuller (Aaron) v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992); *San Miguel v. State*, 864 S.W.2d 493 (Tex. Crim. App. 1993); *Robertson v. State*, 871 S.W.2d 701 (Tex. Crim. App. 1993); *Wheatfall v. State*, 882 S.W.2d 829 (Tex. Crim. App. 1994); *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995); *Mason v. State*, 905 S.W.2d 570 (Tex. Crim. App. 1995); *Heiselbetz v. State*, 906 S.W.2d 500 (Tex. Crim. App. 1995); *Goff v. State*, 931 S.W.2d 537 (Tex. Crim. App. 1996).[4] The conclusion that the application of harmless error analysis – heightened or otherwise – is novel and aberrational is unavoidable.

Further examination of the Texas Court's treatment of *Penry* claims affirms the evasive nature of its actions in this case, and the inadequacy and irregularity of the rule it attempts to invoke to bar this Court's review. Previously, the Texas Court applied a "right not recognized" exception to the contemporaneous objection rule. *See, e.g., Black v. State*, 816 S.W.2d 350 (Tex. Crim. App. 1991); *Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001); and *Ex*

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[3] Of course, this Court did not apply a harm analysis in the course of finding Mr. Penry entitled to relief in *Penry I* or *Penry II*.

[4] As the captions reveal, the citations are to direct appeal cases. The Texas court's practice has been to reject habeas petitions in postcard orders, which are far less amenable to analysis. Nonetheless, counsel's research, though limited by the manner and circumstances of the habeas denials, has not revealed a single habeas case – until this one – in which the Texas Court of Criminal Appeals has applied a harmless error analysis when considering a *Penry* claim.

parte Taylor, 484 S.W.2d 748 (Tex. Crim. App. 1972). *See also Smith*, 185 S.W.3d at 475 (Holcomb, J., dissenting) ("[i]t should go without saying that a defendant does not waive his right to assert a constitutional violation by failing to object at trial if, at the time of his trial, that right had not been recognized." (citations omitted). Applying this rule, in *Ramirez v. State*, 815 S.W.2d 636 (Tex. Crim. App. 1991) the Texas Court granted relief on a *Penry* claim, although the petitioner conceded that he failed to object to the charge complained of, as the novelty of the *Penry* decision permitted an appellant to raise the issue for the first time on appeal (citing *Black v. State*, 816 S.W.2d 350 (Tex. Crim. App. 1991)).

Now, the Texas court has faulted petitioner for failing to anticipate the decision of this Court in *Penry II*, and object accordingly.[5] Unable to avoid the precedent of *Black v. State*, which refused to hold petitioners responsible for a lack of clairvoyance, the court instead applied, for the first time, an ad hoc heightened harm standard that is apparently only invoked in instances of "semi" inadequate instructions.

The Texas court's treatment of Penry claims is chaotic at best. Its application of a harm standard to such claims is entirely novel. There is no established practice requiring a showing of harm – let alone egregious harm – for *Penry* violations based on purportedly inadequate objections at

[5] Indeed, the Texas Court recently held that the problems with the nullification instruction that this Court recognized in *Penry II* and reaffirmed in *Tennard*, were not previously recognized, and were thus considered "new law" permitting consideration of a successive habeas petition raising a *Penry II* claim. *See Ex parte Robertson*, AP 74,720 *23 (Tex. Crim. App. Mar. 16, 2005) (unpublished).

trial. As Judge Holcomb stated: "Our application of error preservation rules, as of late, have been applied capriciously and arbitrarily by this court; therefore a self-proclaimed "adequate" procedural bar cannot insulate the majority's holding from federal review." *Smith*, 185 S.W.3d at 475 (Holcomb, J., dissenting) (citing *Henry v. Mississippi*, 379 U.S. 443, 447 (1965); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)).

C. This Court Should Grant Review To Reaffirm That A State Law Procedural Bar Cannot Be Created To Prevent Supreme Court Review Or Compliance With A Supreme Court Decision.

It is firmly established that a state court may not inconsistently employ a state procedural rule as a means to thwart this Court's review. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456, 457-458 (1958). This Court has been emphatic that only "firmly established and regularly followed state practice . . . can prevent implementation of federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 348-349 (1984).

This Court has repeatedly refused to permit state courts to apply a state-law procedural ground for the first time on remand in order to evade this Court's rulings on a question of federal constitutional law. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 244-245 (1959) (citing *Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 492 (1838)); *Tyler v. Magwire*, 84 U.S. (17 Wall.) 253, 284-285 (1872).[6] But that is exactly what occurred here: the Texas

[6] For example, this court has held that a state law ground of decision is not an independent and adequate state ground if it is

(Continued on following page)

Court of Criminal Appeals invoked a procedural rule that is not "firmly established and regularly followed" on remand to evade this Court's rulings on a question of federal constitutional law.

This Court's many prior decisions limiting the ability of state courts to invent state law grounds or to use inconsistently applied state law grounds to prevent Supreme Court review apply in this case with special force. Here, the Texas Court of Criminal Appeals used the state law grounds, the "egregious error" standard, to avoid compliance with a specific holding of this Court in this case. The Texas Court concluded that Smith suffered no egregious harm because the jury was able to consider most, if not all, of the evidence. *Ex parte Smith*, 185 S.W.3d at 471-72. But this Court expressly found that the instructions were inadequate and the jury's ability to consider the evidence

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created for the purposes of frustrating Supreme Court review. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *James v. Kentucky*, 466 U.S. 341 (1984). Also, the Court has held that state law cannot constitute an independent and adequate state ground if it is a state rule that is not consistently followed within the state. *See, e.g., Lee v. Kemna*, 534 U.S. 362 (2001). *Barr v. City of Columbia*, 378 U.S. at 149 (state procedural rules "not strictly or regularly followed" may not bar review); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 457-458 ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.").

Thus, there is no merit to the concurring opinion's assertion that the egregious harm standard constitutes an independent and adequate state-law ground and therefore deprives this Court of jurisdiction. *See Ex parte Smith*, 185 S.W.3d at 472-73 (Hervey, J., concurring). Since the egregious error standard was created for the purpose of frustrating review by this Court, indeed to prevent compliance with this Court's order, and since it is not a consistently applied rule, it cannot be an independent and adequate state law ground.

was insufficient to meet the Constitution's requirements. *See Smith*, 543 U.S. at 38, 48.

Thus, this case presents an issue of great national importance concerning the supremacy of federal law and the duty of courts, on remand, to comply with the mandates of this Court. *Amici*, former federal court of appeals judges, are particularly cognizant of this duty and its special application when matters are remanded to state courts. *Amici* urge this Court to grant certiorari to resolve the important question presented and to emphatically reaffirm the duty of courts on remand to comply with Supreme Court mandates and not to invent new procedural grounds to avoid compliance.

CONCLUSION

For these reasons, *amici* respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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FILED
NOV 2 0 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 05-11304

IN THE

Supreme Court of the United States

LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

JOINT APPENDIX VOLUME I

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PETITION FOR A WRIT OF CERTIORARI FILED MAY 30, 2006
CERTIORARI GRANTED OCTOBER 6, 2006

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TEXAS COURT OF CRIMINAL APPEALS

Case No. AP-74,228

Ex parte LaRoyce Lathair Smith

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/21/01	Case set for submission, *Ex parte LaRoyce Lathair Smith*, No. AP-74,228, Texas Court of Criminal Appeals.
1/17/02	Applicant's Brief (on submission), *Ex parte LaRoyce Lathair Smith*, No. AP-74,228, Texas Court of Criminal Appeals.
2/7/02	State's Brief (on submission), *Ex parte LaRoyce Lathair Smith*, No. AP-74,228, Texas Court of Criminal Appeals.
3/19/02	Applicant's Reply Brief (on submission), *Ex parte LaRoyce Lathair Smith*, No. AP-74,228, Texas Court of Criminal Appeals.
4/21/04	OPINION on State Habeas, *Ex Parte LaRoyce Lathair Smith*, 132 S.W. 3d 407 (Tex. Crim. App. 2004).
11/15/04	OPINION on Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals, United States Supreme Court, *Smith v. Texas*, 543 U.S. 37 (2004).

DATE	PROCEEDINGS
3/15/05	State's Brief on Remand, *Ex parte LaRoyce Lathair Smith*, No. 74,228, Texas Court of Criminal Appeals.
3/15/05	Applicant's Brief on Remand, *Ex parte LaRoyce Lathair Smith*, No. 74,228, Texas Court of Criminal Appeals.
3/28/05	Applicant's Reply Brief on Remand, *Ex parte LaRoyce Lathair Smith*, No. 74,228, Texas Court of Criminal Appeals.
3/29/05	State's Reply Brief on Remand, *Ex parte LaRoyce Lathair Smith*, No. 74,228, Texas Court of Criminal Appeals.
3/1/06	OPINION on remand, Texas Court of Criminal Appeals, *Ex Parte LaRoyce Lathair Smith*, 185 S.W. 3d 455 (Tex. Crim. App. 2006).

COURT OF CRIMINAL APPEALS

Case Number: AP-74,228

SMITH, EX PARTE LAROYCE LATHAIR,

v.

STATE OF TEXAS,

DOCKET ENTRIES

Date	Event	Description	Disposition Type	Oral
1/11/2005	REINSTATED-HC			No
1/12/2005	ORDER FILED		COURT	No
3/15/2005	BRIEF FILED		APPLNT	No
3/15/2005	BRIEF FILED		STA	No
3/23/2005	SET FOR SUBMIS			No
3/23/2005	SUBMIS NOTICE			No
3/26/2005	REPLY BRIEF FILE		APPLNT	No
3/29/2005	REPLY BRIEF FILE		STA	
4/6/2005	SUBMITTED			No

Date	Event Description	Disposition Type		Oral
10/26/2005	TRANSFER			No
3/1/2006	OPINION ISSD		RELIEF DENIED	No
3/27/2006	MANDATE ISSD			No
6/12/2006	WRIT OF CERT US		FILED	No
10/11/2006	WRIT OF CERT US		GRANTED	No
11/20/2001	WRIT FILED	HC		No
11/20/2001	WRIT FILED	HC		No
11/21/2001	SET FOR SUB-MIS			No
12/3/2001	MOTION FILED	APPLNT		No
12/4/2001	MOTION DISP	APPLNT	GRANTED	No
12/5/2001	MOTION FILED	STA		No
12/5/2001	MOTION DISP	STA	GRANTED	No
1/17/2002	EXT BRIEF FILED	APPLNT		No

Date	Event	Description	Disposition Type	Oral
1/17/2002	EXT BRIEF DISP	APPLNT	GRANTED	No
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2/7/2002	BRIEF FILED	STA		No
2/25/2002	CONV SUB-MISSIO			No
2/25/2002	SET FOR SUBMIS			No
3/7/2002	ARGT RE-QUEST	STA		Yes
3/11/2002	ARGT REQUEST	APP		Yes
3/19/2002	REPLY BRIEF	FILE APPLNT		Yes
3/27/2002	CONV SUB-MITTED			No
3/27/2002	SUBMITTED			Yes
6/5/2003	TRANSFER			No
4/21/2004	OPINION ISSD		RELIEF DENIED	No
5/17/2004	MANDATE ISSD			No

Date	Event	Description	Disposition Type	Oral
11/24/2004	WRIT OF CERT US		GRANTED	No

Pretrial Motions:
Motion to Declare Tex. Code Crim. Proc. Art. 37.071
Unconstitutional As Applied. (Tr. Vol. I, pp 73-77)

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
265th JUDICIAL DISTRICT

[Filed APR 11, 1991]

No. F91-22803

THE STATE OF TEXAS,

vs.

LAROYCE SMITH.

MOTION TO DECLARE TEX. CODE CRIM. PROC. ANN. ART. 37.071 UNCONSTITUTIONAL AS APPLIED

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant by and through his attorneys of record and respectfully moves that this Honorable Court declare TEX. CODE CRIM. PROC. ANN. art. 37.071 unconstitutional as applied for the following good and sufficient reasons:

I.

The Texas statutory scheme for the infliction of the death penalty is encompassed by the provisions of TEX. CODE CRIM. PROC. ANN. art. 37.071. It is provided therein that if the jury should determine that the individual committed the offense of murder while acting deliberately, was *a* person who would likely pose a danger in the future, and/or acted unreasonable in response to any provocation by the victim, that a sentence of death must be ordered. This system has

been upheld as constitutional by the United States Supreme Court in *Jurek vs. Texas*, 428 U.S. 262 (1976). However, in *Penry vs. Texas*, __ U.S. __ (June 26, 1989) the United States Supreme Court held that this statutory scheme may become unconstitutional as applied if the Defendant offers mitigating evidence about his background or character or the circumstances of the crime that are not relevant to the special verdict questions or have relevance to the Defendant's moral culpability beyond the scope of the special verdicts.

II.

It is mandatory that a trial court take judicial notice if requested by a party and supplied with the necessary information. TEX. RULE CRIM. EV. 201(d). Judicial notice may be taken at any stage of the proceeding. TEX. RULE CRIM. EV. 201(f). The trial court may judicially note a fact that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. TEX. RULE CRIM. EV. 201(b). In the pending cause the Defendant will show the Court indisputable evidence that the Defendant was at the time of the commission of the offense 19 years of age. The Defendant herein respectfully requests that this Honorable Court judicially note such fact for purposes of ruling on this motion.

III.

In *Graham vs. Collins*, __ Fed. 2d __ (CAS 8- 2168, March 7, 1990) the Court of Appeals held that the trial court's failure to instruct the jury that it could consider the Defendant's age outside the context of the special issues in determining penalty required that the death sentence imposed be set aside. The Court interpreted *Penry* to mean that where a Defendant supplies evidence regarding his character, background, or the circumstances of the crime relevant to personal culpability beyond the scope of the statutory questions the jury must receive instructions that enable it to give full mitigating effect

to that evidence. The Court held that, as a matter of law, evidence of the Defendant's youth was just such a matter. The court further held that age certainly bears on the issue of moral culpability, yet neither of the special questions posed in that case adequately took such into account. The undisputed evidence in the pending cause will establish that the Defendant was 19 years of age at the time of the alleged commission of the offense. Thus, the Defendant can and will present to the jury at the punishment phase of this trial evidence of his youth in mitigation of infliction of the death penalty as that relates to his personal moral culpability.

IV.

The exclusive methodology for submission to the jury of special issues with regard to infliction of the death penalty are contained in TEX. CODE CRIM. PROC. ANN. art. 37.071. This Honorable Court, as a trial court, can do no more than follow the law as it currently exists in the State of Texas. Therefore, the trial court is precluded in providing any instruction with regard to mitigating evidence which would permit the jury to make a moral reasoned response to the age of the Defendant with regard to the determination of whether to inflict the death penalty. The trial courts of this state may enforce and interpret existing laws, but may not create new laws. For the trial court to create a scheme that would permit the jury to respond to the Defendant's mitigating evidence would contradict the current status of the law. Since the trial court may not adequately provide in the instructions to the jury at the punishment stage a mitigation charge which would permit the jury to respond to the evidence of the Defendant's youth in the determination of whether to inflict the death penalty, the court would be constrained to submit only those issues contained in TEX. CODE CRIM. PROC. ANN. art. 37.071. Thus, as applied to the Defendant in the pending cause, the Texas statutory scheme with regard to the infliction of the death penalty does not permit the proper presentation

to the jury of a mitigation instruction on *a* matter which has been determined to be mitigating as a matter of law. Therefore as applied to the Defendant in the pending cause, the Texas statutory scheme with regard to the death penalty is unconstitutional as applied. The trial court should therefore declare such statute to be unconstitutional *as* applied to the Defendant and prohibit the State from seeking the death penalty in this cause.

WHEREFORE for the foregoing reasons the Defendant respectfully prays this Honorable Court declare TEX. CODE CRIM. PROC. ANN. art. 37.071 unconstitutional as applied to the Defendant.

Respectfully submitted,

/s/ Randy Manasco
RANDY MANASCO
235 W. Yarmouth
Dallas, Texas 75208
(214) 943-6400
Bar No. 12891050

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been hand-delivered to the Office of the District Attorney of Dallas County, Texas on this the 11th day of April, 1991.

/s/ Randy Manasco
RANDY MANASCO

Motion to Declare Tex. Code Crim. Proc. Art. 37.071 Unconstitutional (Tr. Vol. I, pp 78-84)

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
265th JUDICIAL DISTRICT

[Filed APR 11, 1991]

No. F91-22803

THE STATE OF TEXAS,

vs.

LAROYCE SMITH.

MOTION TO DECLARE TEX. CODE CRIM. PROC. ANN. ART. 37.071 UNCONSTITUTIONAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant by and through his attorneys of record and respectfully moves this Honorable Court to declare TEX. CODE CRIM. PROC. ANN. art. 37.071 unconstitutional and in support of same would show the Court as follows:

I.

Certain forms of murder are denominated capital offenses in the various provisions of TEX. PENAL CODE ANN. sec. 19.03. However, the determination of whether or not to impose-the death penalty is governed by the provisions of TEX. CODE CRIM. PROC. ANN. art. 37.071. It is this portion of the statutory authority wherein the State of Texas provides the mechanism for the infliction of the death penalty. It is the Defendant's position that as interpreted this

statute is unconstitutional. In support of said motion the Defendant would show the Court as follows:

II.

The current Texas statutory scheme is unconstitutional and in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States prohibiting the infliction of cruel and unusual punishment. As construed, the statutory scheme permits the overbroad and unbridled discretion on the part of the representatives of the State in determining whether to seek and subquently obtain the death penalty. There *is* nothing in the Texas statutory scheme which properly narrows the scope of those crimes and those actions which should be subject to the infliction of the death penalty. The overly broad and discretionary statutory scheme as adopted violates the Eighth and Fourteenth Amendment prohibitions against the infliction of a cruel and unusual punishment.

III.

The current validity of the Texas death penalty statute was upheld against an Eighth and Fourteenth Amendment challenge in *Jurek vs. Texas*, 428 U.S. 262 (1976). However, the basis for the ruling by the United States Supreme Court was the assurance in *Jurek* that the special issues would be interpreted broadly enough to permit the sentencing authority to consider all the relevant mitigating evidence the Defendant might present to prevent the imposition of the death sentence. However, since that decision of the United States Supreme Court the Court of Criminal Appeals has had numerous opportunities to interpret the statutory scheme and has failed to provide any definitions of relevant words, terms and phrases which would broaden the effect of the special issues so as to permit the introduction' and subsequent use by the jury of mitigating evidence. For example, the Court of Criminal Appeals has refused to define the following words, terms and phrases: "deliberately", "reasonable expectation

that death will result", "probability", "criminal acts of violence", "society" and "continuing threat to society". Thus, the premise upon which *Jurek* was decided, that the Court of Criminal Appeals would expand by interpretation the definition of these relevant terms, words and phrases, has not been fulfilled. Therefore as currently construed, the Texas death penalty scheme is unconstitutional and in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. The United States Supreme Court recognized in *Penry vs. Texas*, __ U.S. __ (June 26, 1989) that certain types of mitigating evidence were beyond the parameters of the statutory scheme as construed in Texas and therefore the statute was unconstitutional as applied.

IV.

The Defendant further maintains that TEX. CODE CRIM. PROC. ANN. art. 37.071 is unconstitutional because it does not provide for the introduction and subsequent use by the jury of mitigating evidence which is not relevant or material to the special issues. There is no provision in Texas for the jury to decide the appropriateness of the death penalty taking into consideration the personal moral culpability of the Defendant balanced by mitigating evidence which is not directly or circumstantially probative in answering the special issues. There is no provision in the current statutory scheme for the jury to render its verdict that the death penalty should not be inflicted because of mitigating evidence of this type.

V.

The current statutory scheme provides that the jury may not answer any of the special issues submitted yes unless it believes the State has proven such special issues "beyond a reasonable doubt". However, there is no statutory definition nor has the Court of Criminal Appeals ever provided a definition for this legal phrase. Therefore the jury is left without guidance as to the standard of proof which should be utilized

in resolving the issues before them. Such a circumstance deprives the Defendant in a capital murder case of the right to a fair trial and due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VI.

It is provided in the Texas statutory scheme with regard to capital murder that if the jury returns a negative answer to any special issues submitted to them that the sentence which shall be imposed is confinement in the Texas Department of Criminal Justice—Institutional Division for life. While "death" has an obvious meaning, the phrase "life in the Texas Department of Criminal Justice—Institutional Division" and the circumstances of such sentence are extremely vague and subject to common misunderstanding and speculation by jurors. The effect of the. jurors common knowledge of the existence of the parole law on a life sentence uninstructed or limited by TEX. CODE CRIM. PROC. ANN. art. 37.071 sec. 4(d) results in a sentencing procedure of unbridled discretion influenced by speculation and wholly arbitrary and capricious imposition of the death penalty.

VII.

The Defendant further maintains that TEX. CODE CRIM. PROC. ANN. art. 37.071 is unconstitutional in that it fails to provide the jury with the option of assessing a sentence of life without parole. Without this option, jurors cannot be assured that a defendant who they believe to be a continuinig threat to society will be removed from society for the remainder of his natural life. Therefore no real option exists for the jury but to condemn the defendant to death. This violates the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States in failing to provide a meaningful alternative for the jury other than a penalty which results in the infliction of death.

VIII.

The Defendant further maintains that TEX. CODE CRIM. PROC. ANN. art. 37.071 is unconstitutional because it fails to provide a methodology by which the jury may consider and give effect to in a constitutionally meaningful way any and all mitigating evidence as such evidence is relevant and material in answering special issues or determining the appropriateness of imposing the death sentence. There is currently under Texas law no definition provided of "mitigation evidence" or mandated instructions as to what constitutes "mitigating evidence". Further, there is no instruction mandated by TEX. CODE CRIM. PROC. ANN. art. 37.071 or any other article in the Code of Criminal Procedure or the Texas Penal Code informing the jury on how to apply evidence of mitigation in answering the special issues. Thus, the referred to article is objectionable to the Defendant because it does not provide for jury instructions on the burden of proving mitigating evidence to the jury, what a jury must do with mitigating evidence if it is proven or not disproven to their satisfaction during deliberations, or what standards are to be utilized in considering such evidence and what, if any, effect may be given to such evidence outside and apart from the special issues currently-contained in TEX. CODE CRIM. PROC. ANN. art. 37.071. The current special issues presented in the Texas sentencing scheme fail to fully address issues concerning the character and background of the accused and the circumstances of the crime which denies and deprives the Defendant of the right to use evidence from experts or laymen regarding the applicability of the special issues to the Defendant and his circumstances.

WHEREFORE for the foregoing reasons the Defendant respectfully prays this Honorable Court declare TEX. CRIM. CODE PROC. ANN. art. 37.071 unconstitutional.

Respectfully submitted,

/s/ Randy Manasco
RANDY MANASCO
235 W. Yarmouth
Dallas, Texas 75208
(214) 943-6400
Bar No. 12891050

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been hand-delivered to the Office of the District Attorney of Dallas County, Texas on this the 11th day of April, 1991.

/s/ Randy Manasco
RANDY MANASCO

Motion to Reveal Mitigation Charge (Tr. Vol. I, pp 87-90)

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
265th JUDICIAL DISTRICT

[Filed APR 11, 1991]

No. F91-22803

THE STATE OF TEXAS,

vs.

LAROYCE SMITH.

MOTION TO REVEAL MITIGATION CHARGE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant by and through his attorneys of record and respectfully moves that this Honorable Court provide the Defendant with a proposed mitigation charge in line with the decision of the United States Supreme Court in *Penry vs. Lynaugh*, __ U.S. __ (87-6177, June 26, 1989). In support of said motion the Defendant would show the Court as follows:

I.

The Defendant in good faith herein advises the Court that he believes that during the punishment stage of this trial for the offense of capital murder he will be able to offer evidence in mitigation which has relevance beyond the parameters of the special issues contained in TEX. CODE CRIM. PROC.. ANN. art. 37.071. In *Penry vs. Lynaugh*, Supra, the United States Supreme Court held that although the Texas death penalty scheme is not unconstitutional per se, it may,

depending upon the circumstances become unconstitutional as applied. In that case the Court held that evidence of a mitigating nature was presented which had relevance beyond the parameters of the special issues contained in TEX. CODE CRIM. PROC. ANN. art. 37.071 and that therefore that the Texas capital murder scheme was applied to Penry in violation of the Eighth and Fourteenth Amendments because the Court's charge to the jury did not permit a "discretionary grant of mercy based upon the existence of mitigating circumstances."

II.

Since the decision of the United States Supreme Court in *Penry* the Texas Legislature has met in several sessions but has failed to address the problems and issues created by the decision of the Supreme Court in that case. The Court of Criminal Appeals has had numerous opportunities to address the problem raised in *Penry* and has failed to do so in any written opinion. Therefore the Defendant and his counsel are unable to look to any statutes or decisions of the Court of Criminal Appeals which explain how the issue of mitigation of punishment will be submitted to the jury at the penalty phase. At this point in time, prior to the commencement of voir dire, defense counsel can only speculate as to the manner in which the Court will attempt to address the "*Penry*" problem at the time of the delivery of the instructions to the jury at the punishment stage. Counsel is therefore prevented from being able to adequately voir dire the prospective jurors since he cannot accurately determine how the Court will attempt to resolve the problem.

III.

The Defendant will be deprived of the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States as well as the due process of law as guaranteed by the Fourteenth

Amendment to the Constitution of the United States if he is not provided in advance of the commencement of voir dire with the proposed mitigation instructions from the trial court to be utilized for purposes of voir dire in determining whether to exercise a challenge for cause or to exercise a peremptory challenge.

WHEREFORE for the foregoing reasons the Defendant respectfully prays this Honorable Court present him prior to the commencement of voir dire with a proposed mitigation charge.

Respectfully submitted,

/s/ Randy Manasco
RANDY MANASCO
235 W. Yarmouth
Dallas, Texas 75208
(214) 943-6400
Bar No. 12891050

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been hand-delivered to the Office of the District Attorney of Dallas County, Texas on this the 11th day of April, 1991.

/s/ Randy Manasco
Randy Manasco

Colloquy Between Trial Court and Defense Counsel
Record Excerpt: S.F. VI: 2-4

PROCEEDINGS

Monday
April 22, 1991

THE COURT: Cause number F91-22803-R, the State of Texas versus LaRoyce Smith.

There are some matters the Defense wished to place on the record prior to jury. selection. Defendant's trial motion number one filed April the 11th, each part is granted. Do you all have copies of those? That's asking for the court reporter to record everything.

MR. MANASCO: I've given them to Mr. Nancarrow, but he may have given them to Mr. Lucas.

THE COURT: A motion to quash has been filed. I've read through it. Is there anything that isn't in the written portion of the motion to quash that you wish to supplement orally?

MR. MANASCO: Judge, the only thing I would like to do is to incorporate—there is an additional motion to quash that I filed with my first batch of motions, I think it's on long legal paper, indicating, basically, that the charges are vague and uses unintelligible language and whatever the specific tracking language is in the Texas Code of Criminal Procedure to quash, and we've asked that that be incorporated with this motion to quash.

THE COURT: I've already ruled on that motion to quash, as I recall, and it was denied at that time.

MR. MANASCO: I believe so. As a matter of fact, Judge, I believe all the Court's motions have been ruled on at this point; is that correct, sir?

THE COURT: Yes.

MR. MANASCO: I don't have—I haven't looked at the Court's jacket. Thank you.

THE COURT: This motion to quash must be denied also.

The two motions to declare Texas Code of Criminal Procedure Annotated, Article 37.071, Section 3701 unconstitutional as applied, I read those and sort of read them and put them in my mind together. Is there anything not included in those two motions that you wish to supplement orally?

MR. MANASCO: No, Your Honor.

THE COURT: Those will have to be denied.

Motion to reveal mitigation charge, I've given you a copy of what we intend to use, and you have a copy; is that correct?

MR. MANASCO: Yes, sir.

THE COURT: If you see something in that charge that you'd like worded differently or you think could be made clearer or better, I'm always willing to entertain different wording or different ways of putting the idea. So if you come up with something you like better, just let me know and I'll look at it.

MR. MANASCO: Thank you.

THE COURT: Motion for discovery of information regarding prior jury service, that being the district attorney's office records on prior jury service of individuals, I'm going to have to deny that as being work product of the district attorney's office.

Motion to restrict the use of peremptory challenges, the State's strikes must be exercised in a racially neutral manner.

For the record, I'd like to say that- I've known—I guess I've known all of the attorneys for at least eight years, and I've known Mr. Nancarrow and Mr. Manasco on a personal,

professional, and social basis, and I know the others professionally and personally, not socially. It's my feeling based on my knowledge of these people and their reputations that all the motions will be complied with, including the Batson motion. I don't anticipate that any of the motions will not be complied with.

MR. MANASCO: Your Honor, in that vein, the motions, at least, hopefully, the way they are drafted and at least the intent is that to be a continuing motion. For example, when I was talking with Mr. Lucas several weeks ago he indicated the only bad acts or—well, prior bad acts that

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[115] THE COURT: I'll go ahead and excuse Ms. Holloway, and I'll tell Mr. McMillen he can go. We'll see you all at 1:20.

(Lunch recess taken.)

(The Veniremen, Mr. Powell, was returned to the courtroom, and the following proceedings were had:)

THE COURT: Mr. Powell, the attorneys at this point are going to have some question as for you. State.

GARY POWELL, a prospective juror, having been first duly sworn and admonished by the Court to respond truthfully to the questions propounded by the parties, testified as follows:

VOIR DIRE EXAMINATION

BY MS. MCDANIEL:

Q Good afternoon, Mr. Powell. My name is Lana McDaniel, and I'm the assistant district attorney. Mark Nancarrow, to my right, is also an assistant district attorney. We will be assisting Mr. Hugh Lucas in the trial of this case for the State of Texas.

At the counsel table to my right is Mr. Winfield Scott and Randy Manasco, representing the defendant, LaRoyce

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[149] have 12 subtlety different definitions of deliberately. And if we don't get a definition from the court that can be — you know, that's a discretionary point.

And the second factor, future criminal acts of violence, I don't know that from what I've heard that we have got a precise definition of that. So I think I could apply it. I don't know that I'd necessarily feel that it restricts my discretion

too much. If anything, it would be, you know, it would be nice to have a little more.

Q You've implied then that you have no quarrel with the hurdles or the screening process and, in fact, wish that there were even more of it. Is that—

A Well, I guess that's—in a nutshell, that's right. It would be nice to—I mean not that I say list any more factors, that there needs to be another five or six factors to jump through, but it's serious business when you're deciding somebody's life or death, and you don't want to have disagreements over something like the meaning of a word. I guess, practicing civil law, we try and nail down all the definitions that could potentially be hangups.

Q What the law has done even further is come up with something that kind of throws this about halfway in a tailspin because there was a decision called Penry that, in effect, tells jurors that they can consider all kinds of mitigating evidence and that if any of that mitigating evidence causes [150] them to feel that the death penalty is not appropriate, then they can, in effect, answer one of the questions no in spite of the evidence to save him from the death penalty.

Now, don't ask me what—you know, how we're going to deal with that except to tell you that we anticipate the Court will give you an instruction more or less on the lines that I've just paraphrased for you. Some people tell us, "Well, to heck with it. Don't bother me with any mitigating evidence. I'll answer these three questions, but I really don't intend to listen to any—you know, if it doesn't fit into one of those categories, then I don't see any reason to listen to it." Others tell us, "I will certainly listen to mitigating evidence, his background."

I think you mentioned earlier something about the more you know about someone, the easier it is to answer these questions. I think you were being asked about if you had just the case itself and nothing more, could you answer the

question, and you said, "Yes, but I would prefer to have other—you know, as much as I could about the individual."

So this decision, in effect, has said we want the jury to have every shred of evidence available from either side—of course, realizing the defendant has no responsibility to bring any evidence unless they want to. Keeping that in mind, would you listen to mitigating evidence if it were presented, or would that be of no interest to you?

[151] A No, I would listen.

Q Could you follow the Court's instructions that, in effect, if you felt the death penalty was not appropriate, even though they might have succeeded in answering the questions yes, could you nevertheless answer one of them no to satisfy, in effect—if you were persuaded that he should not be sentenced to death, could you answer one of the questions no in order to give effect to your belief that the death penalty should not be imposed?

A I'm not sure I understood your question.

Q I'm not sure I understand it, either. The law, in effect, will say that if you are persuaded by the mitigating evidence, that the defendant should not be sentenced to death, then the Court may well tell you that you shall answer at least one of these special issues no in order to give effect to your belief that the death penalty should not be imposed.

Now, some people tell us, can't do it. Other people tell us they could do it, that they could, in effect, misanswer one of the questions in order to arrive at the desired result.

A Well, that's a real tough choice. So the law, as you understand the way the verdict or the form would be submitted, there wouldn't be a fourth choice, any other mitigating circumstances? You have to take these three, work with these three, and regardless of how you might feel about [152] these three, if you feel the other mitigating evidence indicated at that time was inappropriate, pick one of these

three, any one, and answer no, just so you get the result that you think is correct?

Q As bizarre as that sounds, that's exactly right.

A Well, if that's the instruction from the Court, I could follow the instruction from with the Court. Frankly, my legal sensibilities would be more comfortable if they just put a fourth element in there and just ask if there are any other mitigating circumstances that you find make it inappropriate, but if that's what the law requires—

Q So you can abide by the Court's instructions even though it may seem bizarre and sort of offend your feelings as an attorney?

A Yes.

MR. SCOTT: Excuse me just one moment.

THE COURT: While they are discussing that, I can tell looking at you there's still sort of a question on your mind about this deal, so I'll tell him about the Penry case so he can get a perspective.

The Penry case involved a situation where a man was charged with capital murder and he was mentally retarded. There is nothing in there that says anything about mental retardation. The jury got to the end and it was yes, yes, yes. The Supreme Court, without commenting on whether [153] that was a reason to say no, said at least the jury ought to be able to say, yes, all those should be yes, but heck, the guy is mentally retarded and he's got a limited responsibility. Legally, he is responsible for this, but he really shouldn't die for it. A jury ought to at least be allowed to exercise that moral decision. You can see in there, there's nowhere to fit that in.

So the Supreme Court has said that to give effect to your moral decision that the death penalty wouldn't be right in this particular case, we've got to have some way to let you do that. And the way it is—it may seem a little illogical the way

they told us to do it, but that's the way they have told us to do it so we're doing it.

Does that make a little bit more sense why it's done that way?

VENIREMAN: Yeah, historically, now I understand why it's done that way. It just does seem illogical where you take an oath to answer all the questions correctly, and then you subvert that by—and the court says, "Well, in this one instance, we'll let you answer otherwise than what you feel is absolutely the truth in order to give effect to this other."

Well, maybe in the next session they will add a fourth element and just let you—to catch those mitigating circumstances.

[154] THE COURT: We're all hoping.

MR. SCOTT: Excuse me one moment.

THE COURT: Yes.

Q (By Mr. Scott.) I think you've already been explained the business about the—well, what I call legal mishmash about the fine distinction between the word intentionally and deliberately, but the law, I think they have characterised it in terms of intentionally is kind of did he do the act, and deliberately is how did he do it. Frankly, I think that falls perhaps short of really pinpointing the exact distinction if there is one between those two concepts.

The cases have talked in terms of some thought process that has to exist before the fact, maybe not premeditation in the textbook sense of the word, but some sort of thought process, some forethought, if you will.

Now, in the olden days back when I first started prosecuting, they talked in terms of malice aforethought. That's no longer used, but that concept of some type of forethought, some type of thought process before the act has to exist.

The comments I'm just making now, does that make any sense to you at all as far as distinguishing between those two concepts?

A Yes.

Q Juries deliberate. They go back there and go

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[25] excused from the courtroom, and the following proceedings were had:)

MS. MCDANIEL: Submit the juror.

THE COURT: State's challenge for cause is granted.

(A brief recess was taken.)

(The Venireman, Dottie Wright, was returned to the courtroom, and the following proceedings were had:)

THE COURT: As I mentioned to you back there, there's no right or wrong answers. We're just looking for the way you truly and honestly feel about these matters.

With that being said, State.

DOTTIE WRIGHT, a prospective juror, having been first duly sworn and admonished by the Court to respond truthfully to the questions propounded by the parties, testified as follows:

VOIR DIRE EXAMINATION

BY MR. NANCARROW:

Q Good morning, Ms. Wright, how are you?
A I'm fine.
Q My name is Mark Nancarrow. This is Lana McDaniel sitting here with me. We, along with Hugh Lucas, will

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[31] Q Okay. Do you feel that if the circumstances of the case were—convinced you—could convince you, though—
A Right.
Q —just of that case, he has been a model citizen up to the time he committed the offense—
A Right.

Q —the facts of the case alone could be sufficient in your mind to assess the death sentence regardless of the fact that they had been a good citizen up to that point?

A Right.

Q Is that right?

A Right.

Q Okay. Let me tell you a little bit about how the trial works. You are not actually asked to give somebody life or death; what will happen is you'll be asked to answer a couple of questions. The way you answer those questions dictates whether or not he lives or dies. You'd be asked a couple of questions. If you answered them all yes, then he gets the death sentence. If you answer any question no, the judge has to assess a life sentence. You would know when you're back there when you fill out and answer the questions what's going to happen, it's no big secret, the judge cannot change whatever you do. You all put down yes answers, he dies at some point in the future. You put down one "no", he's [32] given a life sentence. That's how the trial would work at that point in the trial. You won't go back and decide, well,—you know, ask yourself, "Should he live or die?" What you'd be doing is asking yourself to answer these questions.

A Okay.

Q How you answer them results in a life or death sentence, okay?

A Okay.

Q Let me tell you what a capital murder is. I don't know if you're familiar with what a capital murder means, but it's different from a regular murder.

A murder would be an intentional taking of someone else's life, you specifically want someone to die. That's what an intentional killing is. You do whatever it takes to cause that person to die and that's what you want to happen. That's an intentional taking of a life.

Capital murder—and for that, for just a murder, an intentional killing, the range of punishment is anywhere from five years to life in the penitentiary, and the possibility of probation. Capital murder is a murder—in this case we've alleged that it happened during the commission of a robbery, and during the commission or attempted commission of a robbery. Okay? That's what elevates a regular—or regular murder case to the level of capital where you can get the death sentence. is if you commit it

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[62] experience where they say, "Well, I don't like it, but I know that sometimes when people are on drugs they do things they wouldn't do otherwise." Other people say—and, therefore, think that may be a mitigating circumstance, but for the fact that he did this, you know, he probably wouldn't have taken drugs, he probably wouldn't have done it. Other jurors look at it the other way, they say, "Well, that's not mitigating, that's aggravating, because not only did he murder someone, but he's a drug junkie, too. He's a drug addict."

So how you feel mitigating evidence plays a part, that's up to you and the other jurors. Again, the person sitting right next to you may be shaking his head while you're talking about something or he may be talking about some mitigating evidence, and you may think, "Oh, that's a bunch of bull," okay? It's what you think that it means.

Now, the—how that comes into play is that it kind of throws all this off into a kilter. The Court will instruct you that if you hear mitigating evidence and that because of hearing certain mitigating evidence you think that LaRoyce Smith should live instead of die and get a life sentence instead of a death sentence, then you shall—which is legal language for must—shall change one of those—those answers from a "yes" to a "no" in order to give effect to your verdict.

In other words, if all you have are two questions [63] and if you believe "yes" is the answer to both questions, then he will die, but if you also believe as a juror that because of the mitigating evidence, because of the facts of the case, because of all of the evidence that you heard in the trial, he should not die, then the law says that you will change your answer, one of those answers to "no". Does that make any sense?

A Yes.

Q Okay. My question to you is that if you heard that type of evidence—again, whatever it may mean to you—are you the type of person that's able to go back and change one of your answers to no in order to give true effect and meaning to your heartfelt need?

A No. If it's proven to me, my answer is going to stay strong as what I feel is right, you know.

Q Okay. So, I take it, that even though you've answered yes to question one and two that if you feel in your heart of hearts, mind of minds that he should not die, then you would be able to follow the Court's instructions and change one of the answers to "no" so that he would receive a life sentence as opposed to a death sentence?

A All I'm just saying is if the evidence is there and I feel that it's a death penalty, yes, it would stay yes.

Q Okay. Fair enough. If you thought that after hearing all the mitigating evidence that the death penalty [64] should still be imposed, you'd keep the answer yes?

A Right.

Q All right. Conversely, if you heard the evidence that convinced you that there was mitigating evidence that he shouldn't die, you could change one of the answers to "no"; is that correct?

A If it was proven that he was innocent or something like that, yes, I could.

Q Well, at that point you as a juror—

A You know as a—all right.

Q Okay. At that point the jurors have already decided that the person has been found guilty, okay?

A Uh-huh.

Q Now, what the question is is whether or not there's anything in his life or background that would tend to mitigate the offense. Like I said, some examples the courts told us if people have a low intelligence level or if they have been abused as a child or things of that nature, those are things at least a jury should be able to consider and decide if that—if the person should live or die, you're able to take those into consideration, okay?

So my question in that regard, if you heard evidence that—mitigating—evidence that you felt was mitigating, then you could give effect to that feeling by putting a "no" answer in one of those slots; is that correct?

[65] A I'm thinking on that. Let's see, I think I would still say yes. It just depends -- yes, I think it would still be yes.

Q I'm sorry.

A Yes.

Q You could change the answer?

A Well, not as I say, change the answer—well, excuse me. Let me say no. In a way, what I'm saying is, no. I'm saying no, you know. It's just like I say, if I've really been proven what it is, I feel it need to be a death sentence, I believe it still would be—my answer still would be yes, you know, as far as the death penalty. No as a life sentence.

Q Okay. That's what the law is saying. They're saying if the answer to both questions are yes, then he's going to get the death sentence.

A Uh-huh.

Q But the law also says that a jury may hear evidence that may make them feel that he shouldn't die. If you heard such evidence and the other jurors felt, you know—if you all came to the conclusion that, "Well, yes, he did act intentionally and deliberately and he is a threat to society, but

because of other things about his life, we don't think he should die," then the law says you'll change your answer to "no".

A Like I say, you got to really prove it to me, but [66] it still would be—yeah, it's possible, yes, I could probably change it, but, you know it's—

Q Okay. Well, I'm probably not explaining it very well, because what I'm trying to say is that it's not just if you hear any evidence. If you hear something about he made an "F" in fifth grade, something like that, that's not probably going to get us there, but the law says if you hear evidence that makes you feel he shouldn't die, then you're able to change your answer to say, "No, he shouldn't." The only way to this is to say no to one of those questions.

Ideally, there should be a fourth question, probably, that says, "If there's mitigating evidence, do you think that it is sufficient to, in essence, spare or save his life," but the law—maybe they'll change that in the legislative session, maybe not, but that's something—the law is a little ahead of how the statutory language is on the special issues.

So I guess all I'm asking you is if you hear evidence that makes you feel that he shouldn't die, the law says that you will give effect to that by changing or by putting in "no" to one of those answers, okay? That's the only way the court can save him is that if there's a "no" answer.

A Uh-huh.

Q I'm just asking you is that if you hear that [67] evidence, can you do it?

A Yes, I can do it.

Q Okay. You don't have any question about that, do you?

A No.

Q All right. Let me just ask you—

MR. MANASCO: Judge, how much time do I have?

Q (By Mr. Manasco) Let me just ask you, what type of evidence do you feel might—might be a mitigating evidence to save him from dying?

A As far as that, just tell me exactly about the person's—what, they're, you know, was trying to do and just give me a little more evidence in what's going on with the case because I think, you know—

Q So you're open to a wide spectrum of things that might be shown to you about him or his background; is that correct?

A Not too far of his background, you know, because I don't want to go back, like I say, if he made an effort and all that there, you know, what's happening now in his life now that—get the background of what's happening now to him or her.

Q There are certain—are there certain factors that are in existence now that would make you think that it

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[3] I guess if the Court would give us lead to in some way—

THE COURT: What we'll do is prior to swearing in those six jurors, we'll ask if they know those people, and if they do and they have a problem, then we'll cross that bridge.

MR. MANASCO: All right. Fair enough. Thank you.

THE COURT: I bet you they won't know them.

(The Venireman, Ms. Lane, was returned to the courtroom, and the following proceedings were had:)

THE COURT: This is Teresa Lane. Ms. Lane, as I mentioned earlier, there aren't any right or wrong answers. We just need to know how you feel about these things.

State.

TERESA LANE, a prospective juror, having been first duly sworn and admonished by the Court to respond truthfully to the questions propounded by the parties, testified as follows:

VOIR DIRE EXAMINATION

BY MR. NANCARROW:

Q Good morning, Ms. Lane. My name is Mark Nancarrow.

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[15] that that crime was violent enough, do you think that you could answer that question yes?

A If there are enough facts about the crime, yes.

Q The reason I say that is because there is no requirement that a person have a prior criminal record. A lot of people say, "You know, what I would want to know in order to predict how he might act in the future, I think, you know,

what would help me the most is to know what crime he's done in the past."

A person is eligible for the death sentence the first crime he commits if it's violent enough, if it's a violent capital murder, killing during a robbery. The law says a jury can assess the death penalty if they are convinced from all the facts and circumstances these questions should be answered yes, including that second one. The jury hears the evidence, says, "Well, you know, I saw what he did here. You just don't wake up that way. And I feel that based on what you told me and what I've seen and what he did, I think he's going to be dangerous in the future." The law says jurors can do that if they're convinced that that question should be answered yes. Okay?

A Uh-huh.

Q And again, we're looking for a juror that's not leaning one way or the other, that they're going to look at these questions and answer them regardless of what that means. [16] If the facts indicate any of these questions should be answered yes and that means he dies, well, that's just what the facts call for and that's the way you vote. On the other hand, if you're convinced these questions should be answered no, or one of them should be no, and that means he gets life, then the jury can do that, too.

Would you be able to do that?

A Yes.

Q Even though you decided he killed somebody during a robbery, if we don't convince you all these should be yes and one of them no, you would have no problem answering knowing he would get a life sentence?

A No.

Q You feel that in some cases a life sentence might be the appropriate punishment even though it's a capital murder?

A Yes.

Q Now, these questions, in essence, are assumed to be no. There is like an invisible no on these questions when you go back there. And we, the State, have got to convince you otherwise. You have to look to us to prove it to you just like you have to look to us to prove to you that he did anything, that he's guilty in the first half.

We are required to bring you the evidence to convince you how these questions should be answered.

[31] A Uh-huh.

Q Ms. Lane, Mr. Nancarrow has talked to you, also, and told you that this scheme of special issues is kind of skewed because a jury can still believe that an act was done deliberately and that he could be a future threat to society but still believe that he should die. It could be his role in the murder. It could be just a fairness issue in terms of other people involved, what has happened to them.

It could be any number of things, but a juror could, in essence, just say, "I don't think he should die." Then if all you have are those two questions, and if you honestly believe the answers were yes, then the person would be killed even though the jury still felt he should live.

And the legislature hasn't quite caught up to the law. The Supreme Court has recognized that, and, ideally, there should probably be a fourth special issue saying regardless of answers one through three, do you feel there is mitigating evidence such that it should save his life or some phrase like that.

I probably wouldn't be a very good legislator since I can't draft it, but that's not the way the law is now. That's not the way the statute is, but the judge would give you in the court's charge an instruction that says if you find there is mitigating evidence, and if you believe that that should save him from the death penalty, then you shall—[32] shall is the big legal word for must—shall change one of the answers to no so that you can give effect to your heartfelt beliefs.

In other words, if there's two yes answers, the judge has to sentence him to death. If there is one no, he gets a life sentence. Those are the only two options. And so the law has said that the only way the judge could give effect to the jury's true belief is if one answer is no.

Do you feel that if you heard mitigating evidence and if you felt that regardless of whether he would be a threat in the

future and regardless of whether you felt the act was done deliberately, if you felt that he should not die, could you go back and, in essence, erase one of the yeses and put no in order to give effect and meaning to your true feelings?

A Yes.

Q I mean, that's what the Court would tell you all to do, that you're allowed to do, and if you felt he should live, then the Court says you shall change one of the answers. In other words, you're not cheating or not giving a true verdict, you're following the Court's law or the Court's rules.

Do you have any problem with that, ma'am?

A Huh-uh.

Q Do you understand why that particular charge would

[171] it three or four weeks." If you feel different, just let us know that, too. If you don't understand the question or what they're asking, just say, "I don't understand your question," and they'll work it around to where it's clear.

THE VENIREMAN: Okay.

THE COURT: All right. State.

LYNN BARTHOLOMEW, a prospective juror, having been first duly sworn and admonished by the Court to respond truthfully to the questions propounded by the parties, testified as follows:

VOIR DIRE EXAMINATION

BY MR. NANCARROW:

Q Good afternoon, Ms. Bartholomew.

A Hello.

Q My name is Mark Nancarrow. This is Lana McDaniel sitting here with me, Winfield Scott, Randy Manasco, and LaRoyce Smith.

A Hello.

Q Mr. Scott and Mr. Manasco represent the defendant, LaRoyce Smith. Myself and Lana McDaniel will be assisting Hugh Lucas in representing the State of Texas.

Let me ask you, first, if you know anybody—any

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[184] "no"?

Q Yes, ma'am, could you—

A Yes, I think it could be a "yes" or a "no".

Q What I'm getting at, some people say—to them it's a domino. If I've decided number one is yes, he acted deliberately, I don't care what you show me, I'm going to answer that second one yes, also, despite what I hear, that

there is no way I could ever answer that second one no if I answer that first one yes. I take it that you could depending on what evidence you hear—

A I think number two—if number one is a "yes," that number two could either be a "yes" or a "no".

Q Okay. These questions are, you know—they're not like dominoes. You don't answer one and that dictates what you do to the other one.

A Correct.

Q You take them independent. You can take them in either order. You can start with the second one first. They're just labeled one and two, but that doesn't mean you have to take them that way. You're supposed to take them independent of each other based on all the facts, let the facts determine what the answer is. By that, I mean don't answer them to get a desired result. Some people say, "Well, if I find that he killed someone intentionally, I want him to die. So, I'm going to answer these yes to get that result [185] regardless of the facts." What we have to have are jurors that will tell us despite the fact that I found him guilty of capital murder and not wanting a specific result, I will answer the questions based on the facts regardless of what the means, live or die.

Do you think you can do that?

A Yes, I do.

Q Just let the facts and the circumstances dictate the way the answers to the questions should be answered regardless of the effect it has, either be a life or death sentence.

A I think I could.

Q Let me go over a couple of rights the defendant has. First of all, he has a right to be presumed innocent. That means as he sits here today, you have got to be able to assure us that you will give him the benefit of that presumption, that you will, in essence, assume he has done nothing until we convince you otherwise, because we, the State, have the

burden of proof. We're the ones that are required to bring the evidence and do the proving and convince you beyond a reasonable doubt that he has, in fact, done something.

Can you require us to do that, hold us to that burden, make us convince you, and if we don't, find him not guilty?

[187] proof, is entirely upon the State to prove that he's guilty. They can sit there and do nothing and say, "Well, you know, you don't have a case, I didn't do it," or, you know, they may choose not to testify or maybe he's not, you know, well-educated or maybe he doesn't speak well or whatever, maybe he doesn't choose to match wits with a lawyer. Whatever reasons they choose, should that occur, you'll be instructed that you cannot consider that as evidence. The lack of testimony, the lack of the defendant testifying is nothing, okay? You'd be limited to what you have before you without consideration to this lack of evidence. Any problem with that?

A No.

Q I want to throw a little wrinkle in here that I forgot to cover on these questions. There's what's considered mitigating evidence under the law. Mitigating evidence is any sort of evidence that might, in a person's mind, tend to reduce or diminish somebody's responsibility for his actions. For instance, if a person is retarded or has suffered abuse or, you know, has been physically abused forever, or has a drug or alcohol problem, those types of factors might, in a juror's mind, tend to diminish the person's responsibility, lessen his responsibility for, in this case, say a death. Well, the law says that in the event you hear certain types of evidence, by a jury, convinces them that, yes, it is your [188] heart, you don't think the person should die for what he did, despite the fact that these questions technically are answered yes, you look at the facts, and say, yes, yes, but see this mitigating evidence, it-really doesn't fit into any one of these questions. You can't really—there's no way to plug it in in deciding those questions. The law has said if you do hear this mitigating evidence and you feel that he should not die for what he did, you have the option to go back and change one of these answers to no to give effect to that feeling that he should not die.

Do you follow me on that?

A Yes.

Do you feel that you could follow those instructions if the Court gave them to you?

A Yes.

Q The reason I say if the Court gave them to you, I don't know if you'll hear any or not in this case, but in the event that any of this type of evidence is hinted at, the judge is required to give you this instruction and by that, I mean if it's hinted at, you know, what is brought out may to one juror be considered mitigating, to the juror sitting next to them, they may say it's aggravating. If you hear evidence that the guy was doing drugs when he committed the crime or has been doing drugs all his life, one juror may be sympathetic to that and say, "Well, you know, he's been doing [189] drugs, if he hadn't, maybe he wouldn't have done this. I don't think he should die because of that." The juror next to him may say, "Well, he's been voluntarily doing drugs all his life, you know, that makes it even worse. If he hadn't been doing those, the person might still be alive. I think it's aggravating. I think it makes it worse because he's not only killing people, he was on drugs when he was doing that."

The point I'm getting at is if evidence was raised or presented, you as the jury are going to have to kind of have two questions to answer about mitigation. First, is it mitigating evidence to start with, you know—you have to decide as a group what you heard, is it mitigating? Secondly, is it mitigating to the point where the person is not as responsible as he should be and should not die for what he did, okay? If that's the case, even though you may have technically answered these questions yes in your mind, you have the right to go back and change—you just pick one. It doesn't matter—go back and pick one and say no, and that would result in a life sentence. Okay.

Any problem with that?

A No.

Q Do you feel that you could do that if that's the way you felt?

A Yes.

Q I've questioned you and gone over a lot of [204] definitely think it's a valid science.

Q So, I take it from that that you'd be at least willing to listen to the witness and if the witness made sense, you could factor it in—

A Yes.

Q —and if it didn't make sense, you could discard it? Okay. The law—kind of getting back to those two questions, it used to be that there were no questions and the jury has—like I was kind of saying or trying to say earlier, they had a wide discretion on what to do. That before these special issues came into being, juries would just decide whether it should be life or death, 15 years probation, whatever. Because of the way they're structured, two "yes" answers equals death, and there's no secret. We're not, you know, trying to hide the law or anything. It's all up front. It's come to the court's attention, primarily, because the legislature is a little bit behind the court's decisions that this format may not be entirely fair because jurors could believe that the act was done deliberately and the jurors could believe that the person—there's a probability that they would be a continuing threat to society, but still believe that the person shouldn't die. In other words, through the whole ball of wax, through the trial and the guilt-innocence and punishment phase, they could just believe that under this fact situation with this person he should [205] die, and by just answering mechanically "yes" and "yes," if that's a true answer, you could never save the person. Like the prosecutor was telling you, the court will indicate that if you believe through what's called mitigating evidence—that's really anything. It's stuff you could hear in the guilt-innocence phase; it's stuff that you could hear in the punishment phase; it's the whole totality of circumstances

—if you felt that he shouldn't die, then you're authorized—actually the court says you shall, which is legal mumbo-jumbo for must, change one of the answers from "yes" to "no" if you feel that he should not die.

Do you have any problem with that?

A No.

Q Okay. I mean, it's not like you're cheating or lying or doing something—

A No.

Q —to change it. That's what the Court would tell you to do to give effect to your heartfelt belief that he should live, okay? Also these two special issues are kind of designed to be high hurdles. In other words, the law is trying to decide of all the people that commit capital murders, murders in the course of robbery, why should some live and some die. They're trying, I think, to remove the—they called it, I think, arbitrary and freakish dispositions or impositions of the death sentence or capriciously done, [206] something like that, that there's no rhyme or reason to it. I think what the legislature is trying to do is set certain barriers or hurdles for the State to get over before a person should be killed, and they're supposed to be high hurdles. In other words, the standard is beyond a reasonable doubt. They're looking for a deliberate act. They're looking for future dangerousness. On top of all that, they're looking for no mitigation to change the answers.

Do you have any problem with the way those special issues are designed and how you could answer them if you felt he should live instead of die?

A No.

Q I think that's really all that I needed to go over with you. Let me just kind of ask you to put yourself in my place. If you're sitting here trying to defend someone, if you're questioning someone with your life experiences or your

values, is there anything that you feel that you would want to know that maybe we haven't explored so far?

A No.

MR. MANASCO: Thank you, ma'am. I appreciate your visiting with me.

VENIREMAN: Thank you.

THE COURT: State have anything further?

MR. NANCARROW: No, Your Honor.

THE COURT: Okay. If you'll step back in

Guilt Phase Trial Testimony Excerpts
Vol. XXVIII: 126-138 (Smith, Johnnie Mae)

MR. MANASCO: Your Honor, the defense would call Johnnie Mae Smith. I believe Mrs. Smith has been sworn.

JOHNNIE MAE SMITH, the witness hereinbefore named, having been previously cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please.
A Johnnie Mae Smith.
Q Mrs. Smith, how are you related to LaRoyce?
A I'm his mother.
Q Mrs. Smith, do you mind me asking how old you are?
[126] A Yes.
Q Do you have another child?
A Yes.
Q Who's that?
A Myron Tyrone Wilson.
Q And Myron Wilson was from your first marriage?
A My first marriage.
Q And how old is he?
A Be 30 in August.
Q Can you tell the jury what Leroy Smith, Mr. Smith, LaRoyce's dad, what does he do for a living?
A I think he's a cook. I'm not sure.
Q The last time that you kept up with his occupation, do you know what he was doing for a living?
A A cook.
Q Leroy Smith, LaRoyce's dad, he had been down to the penitentiary, had he not?
A Yes.
Q What did he go to the pen for?

A Robbery.

Q Is this something that you knew about all along or—

A No, he was just out of the pen when I met him.

Q And he didn't tell you that?

A No.

[127] Q Somewhere along the way, you got information about it?

A Yes.

Q Does LaRoyce have a nickname?

A Yes.

Q What's the nickname?

A Trody.

Q What does Trody mean?

A Nothing specific. My oldest son had a friend that just started calling him Trody when he was a baby, and it just hooked up to him. Everybody just started calling him Trody.

Q He got a nickname and it just—

A Beg your pardon?

Q He got a nickname and it just stuck?

A Yeah.

Q Now, where was Trody born?

A St. Paul.

Q Here in Dallas?

A Yes.

Q When he was born, do you know whether or not there was any type of physical problem that he had?

A He was real nervous and he had to remain in the hospital two days after I was released.

Q What about anything else physical about him?

A Oh, he had a defect in his walking we noticed [128] after he started. He walked like this (indicating) after he started walking, they call it knock-knee splint something.

Q And as a result of that, was he taken anywhere for any type of treatment?

A Yes.

Q Where was he taken?

A Scottish-Rite.

Q And what type of treatment did he receive at Scottish-Rite?

A He had to wear sleeping braces and a shoe with a bar on it.

Q When you talk about braces, obviously, you're not talking about the kind on your teeth?

A It was made like an "H" that I had to put on him, and then the shoes had a bar at the bottom of them, and he had to sleep in them, even during the times he had naps.

Q Now, when Trody was pretty young, did he start some type of a kindergarten or education program?

A Head Start.

Q The Head Start program, where was it located?

A We lived in West Dallas, Dallas West Apartments, and the office part they had this Head Start that—I think it's sponsored by the state.

Q As a matter of fact, did you try to get involved in that program?

[129] A Yes, I used to do volunteer work down there. It was a program like, you know, at feeding time they would put their food on the table just like you do at home on the dinner table and teach them how to eat and all this. It was a lot of things advanced him.

Q Now, where did Trody go to elementary school, ma'am?

A T.G. Terry.

Q Is that here in Dallas?

A Yes. Greenspan.

Q When LaRoyce was at T.G. Terry right at the first grade level, was he tested for a learning disability?

A Yes.

Q Was that something that they just came up, or is that something that you had a concern about and asked them to look at?

Q How did that come about?

A No, they told me that he was kind of slow, and so I asked them, you know, to test him. I think the school—through the school, they do it anyway, so they found out he was slow in his reading, and I asked them to keep him back in first grade because I didn't want them to push him through.

Q Trody, as a matter of fact, had a bunch of tests done at that early age; is that correct?

A Yes.

Q Now, in terms of actually being examined by a [130] physician, were you ever given information that Trody might have an organic brain problem?

A No.

Q If that's something that the school knew they—for whatever reason, that wasn't shared with you, was it?

A No, it was—if they did, I don't remember it.

Q When it was—when you were told that Trody was going to be a slow learner or was a slow learner, did that surprise you in any way?

A Yes—well, not really, because his daddy is a slow learner, so I thought it was just maybe genetic.

Q And he, in essence, failed the first grade?

A Yeah. Well, they were going to promote him and I asked them not to because he needed to, you know, repeat it. I thought he would probably do better the next year.

Q Now, after elementary school, where did he go?

A Hulsey.

Q And that's the same place, I believe, you indicated that your daughter goes to now; is that correct?

A Yes.

Q During this time that he's in elementary school and in the middle school, he is in the special education program; is that correct?

A Yeah.

Q Now, the special education program, do they [131] maintain conferences with you and tell you what the prob-

lems were, or did you just know that's something they were putting him in?

A No, they would keep me informed.

Q Now, when he was in middle school, did he play football?

A Yes.

Q Do you know whether or not he played any other sports?

A I think he took track during track season. He shot some big disc like deal he used to throw.

Q What about—did he play little league?

A Yes.

Q I take it, then, at this point in time when he's in middle school that whatever physical disability that he had—

A It was—

Q —very early, it was corrected?

A Uh-huh.

Q When Trody was growing up, did you all give him any type of religious training? Was he taken to church or anything?

A Yes. When he was about three months old, he was blessed in the Baptist Church with his godparents and all, and he used to go to church with me.

[132] Q As a matter of fact, at least on some regular basis, Trody went to church for most of his adult life, or most of his life; is that correct?

A Well, when he was smaller, then when he tried to work, he didn't go as often.

Q Now, how old is Trody?

A He's 20 now.

Q As a matter of fact, he turned 20 during the jury selection process; is that correct?

A Yes.

Q So, at the time of this offense, then, he was 19 years old?

A Yes.

Q What is his birth date, ma'am?

A April 23rd, 1971.

Q Now, when Trody was at Hulsey, did he play football?

A Yes.

Q Do you know what position he played?

A Nose guard, I think. I'm not sure.

Q Did that particular group of youngsters, did they do particularly well?

A Yeah, they—last year they won every game. They didn't lose a game. They went to state and everything. No one made a touchdown on them the whole year.

[133] Q And was that something that, I assume, all the team members were particularly proud of?

A Yes.

Q Now, ma'am, did Trody—can you tell the jury where Trody went to high school?

A He went to Carter, then he dropped out, then he left—his dad and I separated, so he was trying to, I guess, get his life together, and he went to Louisiana where his—he's got a grandfather there and uncles and aunt, and he—I don't remember the name of the school there that he attended, but he had had an accident during the football season at Hulsey and he had to have surgery on his knee, so I had to bring him back here and have surgery. So after he came back, he just remained here.

Q Let me back up a little bit on that. Is that the Groanoke High School—

A Yes.

Q —in Louisiana? That's in Shreveport, is it not?

A Yes.

Q When Trody was at Carter High School, did he get to play football there?

A Yes. His freshman year he played, and then the next year they wanted him to play varsity and junior varsity and the coach asked me about it, but I told him I wasn't sure

because I didn't feel like Trody could keep his grades up, and [134] this was more important than football, so the coach called me on my job and told me if I would consent to him playing that he would make sure and get him a tutor and everything, you know, so his grades would maintain, but they didn't do that. They lied to me. So after he didn't make his grades, he couldn't play.

Q And it's a situation that his knee was injured somehow?

A His knee?

Q Was it his knee, ma'am, that was injured?

A His knee was injured when he was in the eighth grade, but it didn't really start bothering him real bad until his sophomore year.

Q You had indicated that Trody went to Louisiana because he was trying to get his life together. Now, this was back in what, 1988?

A Yeah, '88. Yeah, '88, '89. I'm not sure. I've got—I knew me and his dad was separated.

Q Let's talk about that. How long had you and his dad been married?

A Oh, we been married 19 years now—well, 20.

Q And do you know or is—do you know why you all separated or why you wanted to get away from his dad?

A He had joined a motorcycle club called the Hornets and he was vice president. He got involved with that, women, [135] booze and drugs.

Q Now, in terms of drugs, do you know what type of drugs your husband was using?

A Crack cocaine.

Q Now, as a result of him being on crack cocaine, did that change the attitude that he had with his children and his attitude that he had with you?

A Yes.

Q Prior to that time, how was -- how did Trody get along with his dad?

A They didn't get along.

Q I'm talking about prior to you all's separation.

A Oh, before?

Q Yes, before.

A Yeah, they were good friends. He used to take him everywhere. When he first bought his bike, he used to take him riding. He used to tie him on the back and they would go to Shreveport and different places. He would tie him on there so he wouldn't fall off just in case he got sleepy.. And then after he got involved in the motorcycle club, he ditched him, and that hurt him.

Q In terms of when he joined the motorcycle club and got on crack cocaine, did you start noticing things were missing around the house?

A Yes.

[136] Q What all of a sudden started showing up missing?

A He took my daughter's T.V. He took our T.V. from the bedroom and sold it.

Q When you say he, who are you talking about?

A Leroy.

Q Your husband?

A Yes.

MR. LUCAS: Your Honor, our only objection would be the relevancy to this particular hearing involving the husband and the drugs and the thefts. We object it's not involved in this hearing in this phase.

THE COURT: Let me see the attorneys at the bench for just a second.

(There was an off-the-record discussion held at the bench, out of the hearing of the jury and court reporter, after which the following proceedings were had:)

MR. LUCAS: We'll object to it, Your Honor.

THE COURT: I'll have to overrule your objection.

Q (By Mr. Manasco) Ma'am, I think you were at the point where you were telling us that things that you all had worked and earned for at the house were being stolen by your husband; is that right?

[137] A Yes.

Q What was taken from your place by your husband?

A The deep freezer.

Q The deep freezer?

A Yes.

Q All right.

A I used to sell Tiera glassware.

Q What type of glassware?

A Tiera.

Q What type is that, ma'am?

A It's a glassware. It's pretty expensive. I used to sell it, and I had over $2,500 worth of glassware that I had won for being top salesman, and all of it came up missing.

Q Did you find out that your husband had sold it?

A Yes.

Q Was he selling it for drugs?

A Yes.

Q Did it get—can you tell the jury, when you realized all this stuff was missing and your husband was stealing it, what did you have to do in order to protect your own and you children's own property?

A My son, he lives in Mesquite, my oldest son, I had to—he came over and got—and took the VCR. He took my microwave, and I had some glass demijohns that cost some hundred dollars apiece that I had won. He had to take all [138] them over there, too.

Q What are demijohns, ma'am?

A Glass jars. Jars stand about this high (indicating) from Tiera that I won.

Q You gave them to your son to take?

A Yes.

Q Where was he going to take that?

A To his house.

Q Why?

A Because my husband was going to sell it. He would sell anything he could get his hands on to get money for drugs.

Q When all this was going on, did that have an influence or impact on your son, Trody?

A Yes. He was really upset about it. Even my daughter, we all were upset about it. So there should be police reports where I had called trying to get him out of the house, and I finally—he finally did leave.

Q When you say he left, you talking about your husband?

A Yes.

Q And did he move in with another woman?

A Yes.

Q And Trody found out about that, did he not?

A Trody knew about the woman all along.

* * *

[11] anyone, we would like to know about that.

MR. LUCAS: I know many people with the organization purely on a professional basis, and I'm not aware of any reward and I've not talked to Mr. Barrett in many months.

MR. SCOTT: That was just in an abundance of caution. I have no reason to think otherwise.

MR. MANASCO: Your Honor, our next witness that we anticipate to call is the defendant, LaRoyce Smith. We would like the Court's permission for me to make brief inquiry to make sure that it's abundantly clear that he is aware of his rights and that any decision that's made concerning where he does or does not want to testify, truly reflects his desire to present certain evidence in front of the jury. If we could make brief inquiry on that.

(Defendant sworn.)

LAROYCE SMITH, the witness hereinbefore named, having been cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

SUB ROSA EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please, sir?

* * *

[34] Q Let me jump now to high school and ask if you went to Carter High School?

A Yes.

Q All right. That's here in Dallas?

A Yes.

Q How far did you get in Carter?

A 9th.

Q Now, you were, what, 18 years old when you were in the ninth grade?

A Yes.

Q Okay. Now, most people are either seniors or hitting college where they are 18?

A Yes.

Q You were in, what, the ninth grade?

A Yes.

Q Did you play football at Carter?

A Yes.

Q Tell us about that.

A I played my first year I went to Carter, and after that year was over, the coach, Freddy James, he asked me to come to varsity to play. And I believe that same year I had failed, and he gave a call to—that next year came, he gave a call to my mother and told my mother that if she'll let me play, he'll make sure that—he'll tutor me hisself and make sure I got my grades. And I played, and I believe I failed [35] again, I failed a class and my mother made me stop.

Q Did you go to school in Louisiana for Groenoke High School?

A Yes.

Q All right. And was that, again, I guess part of the ninth grade?

A Yes.

Q All right. When you went to—why did you go to Shreveport?

A Well, I went because I told my mother that I wanted to start over and get my education back the right—and she said—she told me—well, she said, "You're older than"—she said, "You're too old to go back to school." She said, "You're going to have to study for your GED" and, you know, continue that away.

And I told her that I wanted my high school diploma, and I told her that I wanted to go to Louisiana in order to get away.

Q All right. Now, was this during the time when you and your family were having some problems?

A Yes.

Q Did you get to play football in Shreveport?

A No, sir.

Q Okay. Did you want to?

A Yes.

[36] Q Why didn't you get to play?

A Well, I enrolled too late down there in Groenoke High School.

Q Did you do anything with the team or try to prepare in case you could play in the future?

A Yes.

Q What did you do?

A Well, coach, I believe his name was King, he had me to lift weights every day and to work out every day.

Q So you were doing that even though you weren't even on the football team?

A Yes.

Q All right. Hoping that one day you might be again?

A Yes.

Q Now, in terms of the time when you went to Shreveport, can you tell the jury what you knew about your father and—your father and your mother having problems?

A Well, I just know that my father and my mother, they used to argue all the time.

Q All right. And did your father ever hit you or anything?

A No, sir.

Q Did he ever threaten you with any type of weapon or anything?

[37] A He pulled a knife on me once.

Q When did he do that?

A My mother, she had bought her a '88 Ford Tempo, and we had a '79 Grand Prix, and my mother gave it to me and she told me I could drive it and have it fixed. I had to

have it fixed in order so I could get my license. And so I was working, I believe, at Wyatt's, and I bought an alternator and a battery and some tires and I believe, the muffler, something was wrong with the muffler, and the brakes was broke, and I had them fixed.

And so my father came home from—he had been gone about three, two or three days, and he came home. And him and my mother got into it over the Grand Prix.

And he told her that, "You have a car." You know, "Let me have this car."

And my mother said, "No," she gave it to LaRoyce.

So my father said, "LaRoyce, give me the car keys."

And I said, "No, my mother gave the car to me, and I went and bought all the equipment for it."

And so he said—he took the keys and went outside to leave. Well, my mother caught him behind the grand Prix.

And I said, "No, you can't have it. Mother gave it to me." I said, "Let me take my stuff off of it, then you [38] can have it.

Then he started to jack it up. Well, he went to the trunk and got the thing that you jack the car up and he put that on. And then we had a garden hose in front of the yard, and I picked that up, and he ran in the house and got a butcher knife. He told me I better drop the garden hose or he was going to hurt me. So I didn't drop it, and he left.

Q You said that your parents were fighting and arguing. Did you see this?

A Yes.

Q How did it make you feel?

A Well, it wasn't too happy for me or my sister.

Q What did your sister do? What were you all doing when you all would hear them arguing?

A Well, my sister, she would cry and run up to her room. Well, she would first tell—she would say, "Stop, Daddy."

And he would say, "Go to your room," and she would go to her room.

Q Now, did you know that your dad was stealing from you all to support his crack habit?

A Yes.

Q All right. Did you know anything in particular—were you there when he actually stole something from the house that was going to be used to buy some drugs?

[39] A Yes.

Q Tell the jury about that.

A Well, me and my sister were there, and I believe that day he had came, my mother called the police and the police told him to leave and not come back until she come back. He left and he came back with another guy, and they came and he unplugged the deep freezer and put the deep freezer on this dolly, him and this guy.

And I said, "What are you doing?"

And he said, "I'm taking my deep freezer."

And I said, "That's my mother's deep freezer."

And he said, "No, this is my auntie's deep freezer, my aunt." He said his Aunt Rosy gave it to mother, and he said he's taking it back. He put it in this guy's truck and they left.

Q Did you know that your mama had to take other things that maybe could be pawned or sold to her other son's house to keep your daddy from stealing from you?

A Yes.

Q Did you ever see your dad on drugs?

A No, just drunk a couple of times.

Q Did the relationship that you have with your father, did it change during this period of time?

A Yes, it changed.

Q Tell us about that.

[40] A Well, when he first joined the motorcycle club, they would have events like motorcycle racing and some event called the drinking event, who can drink the bottle up first. It would be like a bottle about so tall of Thunderbird, and they will drink—who can guzzle it and be the first one to drink it up, and he used to take me to those events. Then once a couple of times after that, he just stopped taking me.

And I asked him, "Could I go?"

And he said, "No."

Q And did he go to—did you have a pretty good relationship with him before this?

A Yes.

Q Okay. And after this, after he started stealing from the family and doing the crack, how was your relationship with your dad?

A We would argue and fight all the time.

Q How did it make you feel?

A Well, it wasn't joyful.

Q Do you remember the first time that you ever got a part-time job?

A Yes.

Q How old were you?

A I was actually 15, but I believe it was a couple weeks before I turned 16. And my brother had a friend named Byron, he was a manager at this—at Wynnewood—in

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Defense Closing at Guilt/Innocence
Excerpt: Vol. XXX: 27-29

CLOSING ARGUMENT

BY MR. MANASCO:

Members of the jury, I told you Monday this would not be a pretty case to listen to, pretty case to watch, and it wasn't. You know when we started picking the jury—it took us four weeks to do that—and I told you all, the ones I talked to, that I wanted a smart juror and I wanted a jury that would give us a fair shake, that wasn't on anyone's team, that wasn't a last link of law enforcement, that would give us our due, that would listen to the evidence, apply the facts to the law the judge would give you and come up with a just decision. Justice. That's what this is all about.

I told you Monday that the State has built its case upon people who should have been here on trial themselves but weren't.

Broadnax. Investigator Broadnax, "Yeah, I filed capital murder charges on Kevin. It was fair."

[28] Devario, their star rebuttal witness, "seems fair. We should all be in the same boat."

I have to speak now. I know that I would probably give up almost all of the time I had left for five minutes after Mr. Lucas, but that's not what the law says. The law says that they have the burden of proof, they have the right to close, and just because I can't get up and I've got to sit over here and be quiet doesn't mean that there's not an answer to what he has to say.

I told you I wanted you all to listen with a critical ear to the testimony, and I know you did. I'll ask you all to use that same critical ear when you're answering and discussing Mr. Lucas's comments.

You know, every case seems to have some kind of a theme, seems that way, at any rate. What's the State's theme? Well, they build their whole case around their assumption that LaRoyce is the ring leader. That's just what Mr. Nancarrow just got through talking to you. Says he's the one who worked there. He's the one charged.

You know, when you look at all the evidence and compare the two, they tell you LaRoyce is calling all the shots. Yeah, right. Let's look at it. Who's been to college? Remember Kevin? Kevin got kicked out of El Centro for having a gun, they said. LaRoyce has been in special ed since he started school. LaRoyce is the one who flunks the [29] first grade after he's been in Head Start since he was three years old. LaRoyce is 19 years old and he's in the ninth grade. Yeah, he's the brains.

Who's been robbing and in the robbing business? Well, Kevin. There is no dispute about that. All the witnesses truck up there and say, "Yeah, Kevin robs those dope houses, and he brags about those 7-Elevens." Bragging seems to be a trademark of Kevin Shaw. That will become obvious.

Reasonable deduction from the evidence, LaRoyce Smith does not have any felony convictions at all, doesn't have any crimes of moral turpitude, or they would have brought them out.

These people aren't stupid, they're the best and the brightest, and that's why they're trying a capital murder case.

Who wants a gun? Kevin. That makes sense, doesn't it? Did that seem like a lie when he said, "Yeah, Kevin told me to go get a gun"? He even tells you where he got the gun. If they wanted to—they've got three lawyers over here, no telling how many investigators, two police departments, DeSoto and Dallas. If they wanted to bring that gun—they told you his name, would have told them their address, phone number. They could have called and said, "No, huh-uh, no, oh, Trody

said he was going to do some serious robbing. He was going to do some killing, kill some girl."

Punishment Phase Trial Testimony Excerpts
Vol. XXXII: 2, 10-11 (Nicks)

PROCEEDINGS

Tuesday
June 11, 1991

MR. MANASCO: Your Honor, the Defense would call Reverend Nicks. I do not believe this witness has been sworn, Judge.

(Witness sworn.)

SAMUEL NICKS, the witness hereinbefore named, having been cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please, sir?

A My name is Samuel Nicks.

Q All right. Mr. Nicks, can you tell the jury what you do for a living or occupation?

A I am pastor of the Lighthouse Gospel Center Church in Dallas.

Q Where is that located, sir?

A That's at 1730 South Ewing Avenue.

* * *

[10] Q Now, Reverend, in terms of possible rehabilitation, do you think what you know about LaRoyce that he is capable of being rehabilitated?

A Most definitely.

Q Now, Reverend, I think you had—something I didn't know about before, but when we were talking in the back, you indicated to me that you were raised basically in a ghetto-type environment; is that correct?

A Yes.

Q Is it a situation where even though maybe they don't have the best shades of life, that they can come out of adversity and make something of their life from that?

A Yes.

Q You talk about that in your services, sir?

A I try to portray a self-image and instill some type of vision in everyone because so many kids that are in the inner city have a tarnished self-image, they're already labeled at what you're supposed to be. People label you, they address you as what they think you are, and when those things are planted, those things have a tendency to grow.

Q Now, Reverend, were you aware that LaRoyce's parents were going through some serious problems a couple of years back?

A Yes.

[11] Q Okay. Well, are you also aware about his situation where his daddy was stealing from the house to support his crack habit?

A Yes.

Q All right. So, that's something that you were made aware of back then; is that correct?

A Yes.

Q All right. Reverend, when a family is going through a situation like that, based upon your counseling and life experiences in particular as a minister, someone who's trying to help get people's lives back together, can you tell the jury whether that type of situation tends to have an adverse effect on the children?

A It does, because children usually have an identity crisis. When the male figure in their life acts up, it's a situation where a child is going through rebellion anyway, between the ages of 16 and 21, and family troubles definitely affect the children.

Q I guess, basically; just to sum it up, do you think there is worth in value to LaRoyce Smith?

A I most definitely do. I think that LaRoyce is a good person. I think he has qualities that have not come out and I think that he would be a help to society in the future.

* * *

Punishment Phase Trial Testimony Excerpts
Vol. XXXII: 14-49 (Pingle)

[14] MR. MANASCO: Your Honor, the Defense would call Alberta Pingle. Your Honor, this witness has not been sworn.

(Witness sworn.)

ALBERTA PINGLE, the witness hereinbefore named, having been cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please, ma'am?
A Alberta Pingle.
Q All right, Ms. Pingle. Can you tell the jury what you do for a living or occupation?
A I'm an employee of the Dallas Independent School District, and I work for the special education department.
Q What is your title or role in the special education department, ma'am?
A I'm a specialist and I'm responsible for the operations of the special education department including budget planning and records.
Q Okay. Ma'am, did I ask you to come down to review certain records?
[15] A Yes, sir.
Q Now, the records I showed you are on blue xerox paper, and I think you indicated that when I was out—although I didn't talk to you at the time, I was told about your blue paper yesterday, that was your idea to put stuff on blue paper; is that correct?
A Yes, due to funding restraints.
Q Okay. So, you wanted to use whatever paper you had?

A That is correct.

Q So, even though maybe the original records are not on blue, have you gone through all the records—well, I'll show them to you again, but all the records you've gone through, you have initially indicated that you have compared them with the originals and that these are, in fact, true and correct copies?

A Yes, sir.

Q I think you even put your initials on the top of all of them; is that correct?

A Yes, sir, it is.

Q Ma'am, some of the records I'm going to show you, they'll have certain pages and then they'll have test results that maybe are not attached, but you have the entire file at your disposal; is that correct?

A Yes, sir.

[16] Q All right. Mr. Lucas has talked to you about some records; is that correct?

A Yes, sir. Just a moment. Who is Mr. Lucas?

Q I'm sorry. It's the man right here (indicating).

A Yes, sir.

Q So, if there's anything unusual about the records that can be clarified, you have everything with you; is that correct?

A Yes, sir.

Q All right. Thank you, ma'am. Let me show you what's been marked and clipped with a red clip as Defendant's Exhibit 38. Instead of marking them all individually, looking at them as a batch, if you'd just look through that, first of all, and see if all those have your initials on them and those are the records you looked at and compared them with the original to make sure that they're true and correct copies.

A Each one has my initials.

Q So, you don't have any problem with that, at least the documents are the ones that you have looked at and

compared to make sure they are accurate with the official records that they come from, they're xerox copies; is that right?

A Yes, sir.

Q Ma'am, the records contained in Defendant's Exhibit 38, are these records that are kept on a—at the [17] special education department?

A Yes, sir, at E. D. Walker Special Education Center.

Q Now, where is that located?

A 12532 Nuestra Drive in Dallas.

Q Okay. Are these records kept on a day-to-day, week-to-week, month-to-month basis?

A Yes, sir, by board policy.

Q Are these records—

MR. LUCAS: Judge, we have no objection—without laying the predicate, if they intend to offer them.

MR. MANASCO: Your Honor, we'll offer into evidence Defendant's Exhibit 38.

MR. LUCAS: No objections.

THE COURT: It has been admitted.

(Defendant's Exhibit Number 38 admitted into evidence.)

Q (By Mr. Manasco) Ma'am, let me show you what has been marked on the first page of Defendant's Exhibit 38 and ask if this is dated 4-14-78; is that correct?

A Yes.

Q Okay. Is this a sort of analysis sheet that was conducted back then or written back then; is that correct?

A That's correct. That's a teacher's report.

Q Okay. Can you read for the jury these first two [18] paragraphs, please?

A Yes, sir. "Attendance regular performance, nil; progress, nil; very low retention; has not learned all letters;

cannot read simple words; cannot preform number functions beyond counting; good speech; fair handwriting; does not know address, birth date; fair interaction with peers; is a little rough, but enjoys his friends; must be kept separated from a few because he's easily led into trouble."

Q What does the last paragraph read, ma'am?

A "Very hesitant to respond to teacher's questions on request; speaks in whispers; tries to control actions at teacher's request, but sometimes fails; has received corporal punishment twice."

Q Corporal punishment is spanking?

A I can't say.

Q You don't know?

A I'm assuming that that would be, but I can't say.

Q All right. Let me show you Defendant's Exhibit 39 and ask you if this is a chart that was prepared that indicates some of the phrases on there. Are those phrases on Defendant's Exhibit 39 contained on the first page of 38?

A Yes, exactly.

Q All right. Even to the misspelled words—

A Even to the misspellings. I'm sorry you pointed that out.

[19] Q Now, a teacher wrote that, didn't she, ma'am?

A That's correct.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 39.

MR. LUCAS: Judge, we're going to object to Mr. Manasco's notes and everything. The records speak for themselves. We have no objection to the witness saying anything, but the personal chart of Mr. Manasco, we do object to.

THE COURT: Objection is overruled. It will be admitted.

(Defendant's Exhibit Number 39 admitted into evidence.)

Q (By Mr. Manasco) Ma'am, the jury is going to get all of this, but this is little bitty and this is a lot bigger, okay?

MR. LUCAS: Again, we object to the great big when the little bitty is in evidence, Judge.

THE COURT: Objection is overruled. I've already made my ruling.

Q (By Mr. Manasco) So back—at least in terms of what I'm presenting, back on 4-14-78, the first document that I'm concerned with, it indicates nil, meaning what? What does nil mean to you?

A Nothing.

[20] Q All right. It also indicates that he must be kept separated from a few because he's easily led into trouble; is that correct?

A That is what it says.

Q All right. Ma'am, let me direct your attention to the next document which is going to be 10-6 of '78. Is this a history and physical examination document?

A Yes, sir.

Q Okay. Is this notation made by, apparently, a physician, Richard M. Adams?

A Let's turn to the back to see exactly who did it.

Q Yes, ma'am.

A Yes, sir.

Q Okay. One of the—on page four of four is indicating medical diagnosis of slow learner?

A Yes.

Q Okay. Let me show you Defendant's Exhibit 40. Does that indicate the date the medical diagnosis of slow learner?

A Yes, sir.

MR. MANASCO: All right. Now, I would offer into evidence Defendant's Exhibit 40.

MR. LUCAS: The notations of counsel are clearly not admissible and we would object to it because we're not allowed to do that.

[21] THE COURT: Objection is overruled. I'll give you an opportunity to do that with any of your documents.

MR. LUCAS: Judge, our witnesses have all gone home from the first phase of the trial, and it's kind of late.

THE COURT: Let me have the jury step back into the jury room for just a moment.

MR. LUCAS: Well, we withdraw the objection.

MR. SCOTT: Object to side bar—

THE COURT: Let me have the jury step into the jury room for just a moment.

(The jury panel was retired from the courtroom, and the following proceedings were had:)

THE COURT: Record reflect the jury is not present at this time.

For the record, I assume Mr. Manasco learned this technique at the same prosecutor school we attended when we were both at the district attorney's office, so it is something that is known to the prosecutor or has been used by the D.A.'s office in the past, and I've never seen a problem with it and I don't see a problem with it in this instance, so I'm going to allow it.

I'll give you a running objection to the entire range of use of these types of documents.

[22] MR. LUCAS: We do renew our objection, Your Honor.

THE COURT: Yes, sir.

MR. LUCAS: Note our exception.

THE COURT: Yes, sir. We're ready for the jury.

MR. LUCAS: I'm not sure Mr. Scott was the trainer there or who, but we object to it.

THE COURT: We're ready for the jury.

(The jury panel was returned to the courtroom, and the following proceedings were had:)

Q (By Mr. Manasco) Ma'am, let's jump to the next document which is 4-27-81. Does this tend—what is this document?

A Developmental and sociological survey information.

Q Is this information that is retrieved from the parents?

A That's correct.

Q Where it asks, what problems are seen by the parents, can you read what this says, please?

A "He is slow and has difficulty remembering what he has learned."

Q All right. That was back in '81; is that correct?

A Yes.

[23] Q 4-27-81?

A Yes, sir.

Q All right. Defendant's Exhibit 41; is that what that says?

A Yes.

MR. MANASCO: We would offer Defendant's Exhibit 41.

MR. LUCAS: Respectfully object to counsel's notes being admitted into evidence.

THE COURT: Overruled.

(Defendant's Exhibit Number 41 admitted into evidence.)

Q (By Mr. Manasco) Now, the 78 is a medical diagnosis; is that what that says?

A Yes, it is.

Q All right. That's by that Dr. Adams or whatever—
A Yes, sir. Richard Adams.
Q Who is Richard Adams?
A He is the director of health services for the Dallas Independent School District.
Q In '81, this is what his mama says, that he's slow and has difficulty remembering what he learned; is that correct?
A Yes, sir.
[24] Q All right. Ma'am, let me jump now to 5-20-81 and ask what this document is.
A Admission Review and Dismissal Individual Education Plan Committee Report.
Q What does it mean when it says committee report?
A By federal and state regulations, decisions about a handicapped student's schooling must be made by a committee consisting of prescribed members.
Q How many people have to agree that someone has a learning problem?
A At that time, it did not have to be consensus, so that there could—the persons on the committee did not have to agree.
Q Okay. Now they do?
A Yes, they do.
Q Okay. Everyone that agrees signs off on this; is that correct?
A Yes, or disagrees, they sign off.
Q Fair enough. In terms of this, when it has a review of an individual evaluation, it has them checking off certain things; is that correct?,
A Yes, sir.
Q All right. On his form back on 5-20-81 in terms of the things that are checked off, what is checked off?
A Checked off the date of the medical—
[25] Q I'm sorry. I'm talking about down below.
A It indicates that an assessment was done and that the

child has been found to be learning disabled and speech handicapped.

Q All right. In terms of if he's—if you multiply the handicap—I guess that means that there's more than one handicap.

A More than one.

Q What is a primary handicap?

A Primary handicap is learning disabled.

Q Is that abbreviated L.D.?

A Yes, sir.

Q Secondary is what?

A Speech.

Q The next page, ~~does it indic~~ate what special education classes they're putting him in?

A Yes, sir.

Q What are those?

A Language arts—no, excuse me—reading.

Q Okay.

A And speech therapy.

Q Reading and speech therapy?

A Yes, sir.

Q All right. The social studies is not a special ed class?

[26] A No, sir.

Q All right. Well, let's mark that out. There's a little arrow; is that correct?

A Yes, sir.

Q So, where it has special ed social studies was listed, but apparently, that's not one of the classes.

A Yes, sir.

Q Okay. All right. So—

A Neither is language arts.

Q Oh, that's not one either, okay.

A No.

Q All right. You see why there's a blob there, correct?

A Yes, I understand how you could misconstrue that.

Q All right. So, reading and speech therapy, right?

A Correct.
Q So, Defendant's Exhibit 42, that's what it says?
A Yes.

MR. MANASCO: We offer into evidence Defendant's Exhibit 42.

THE COURT: Same objection?

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 42 admitted into evidence.)

[27] Q (By Mr. Manasco) Ma'am, I wore my contacts too long and I'm having to wear glasses, but you can—at least in terms of the way the forms are, you can see how that could be an honest mistake; is that right?
A Absolutely. I had to look twice.
Q All right.

MR. LUCAS: Judge, renew our objection on that. There's clearly wording on there that has no application to this case.

MR. MANASCO: I marked it out, Judge.

THE COURT: Objection overruled.

Q (By Mr. Manasco) About 9-15-81, first of all, what is this particular examination?
A History and physical examination.
Q Is this—we've seen that before, haven't we?
A We've seen this form before.
Q Okay. Who is this done by?
A Richard Adams.
Q Is he the same guy you talked about before?
A Yes, sir.
Q All right. On the medical diagnosis, it's marked down—it says impression; is that correct?
A Yes.
Q It has what?

A L. problems.

[28] Q All right. You know what that means?

A Learning problems.

Q All right. When it has explanation, can you read what it says there?

A "Possible organic cause for learning problems. See number five."

Q All right. Organic cause?

A Yes.

Q All right. What's organic?

A Physiological.

Q Okay. So 9-15-81, it indicates possible organic cause for learning problems; is that correct?

A Yes.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 43.

THE COURT: Same objection?

MR. LUCAS: Same objection.

THE COURT: Will have to be overruled.

(Defendant's Exhibit Number 43 admitted into evidence.)

Q (By Mr. Manasco) Now, this possible organic cause, that is a notation by the physician; is that correct?

A That's correct.

Q All right. Dr. Adams, all right. Let's jump to 9-18-81, and ask if this is another committee report?

[29] A Yes, sir.

Q Can you read to the jury what the first paragraph when it talks about his—what the analysis is.

A "Peabody Picture Vocabulary Test—Revised demonstrated a three-year, six-month deficit as compared to chronological age in the area of receptive vocabulary skills. The TOLD"—t-o-l-d.

Q What is that?

A That is a language test that—I can't tell you what it stands for.

Q Okay what does it say about it?

A "Also demonstrated the same measurable deficit and also indicated a severe deficit in grammatic completion. A two-year deficit was demonstrated in oral language."

Q Is that what Defendant's Exhibit 44 says?

A You have a misspelling, and, for once, it's yours—

Q Uh-oh—

A —not the teacher's.

Q —where is this?

A Chronological.

Q I didn't write this. They can't read my handwriting, ma'am, so I had to have someone do it, but other than chronological misspell, I just put "sp," that's the abbreviation for misspelled, isn't it?

[30] A Uh-huh.

Q How embarrassing. Is it still the—

A Well, you pointed the one out for us, we're even.

Q Is it still accurate?

A Yes.

Q All right.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 44 with apologies to the Court.

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 44 admitted into evidence.)

Q (By Mr. Manasco) Have you ever heard the phrase, "You just can't get good help these days," ma'am?

A Yes, sir.

Q Ma'am, let's jump to 5-25-82, at least it's stamped 5-25-82, and again, is this an annual review?

A Yes.

Q In terms of comments, what does it say in terms of comments?

A "Referral is being made for psychological consultation."

Q All right. So, they're trying to now have some sort of psychological consultation—at least requesting that?

[31] A Yes, sir.

Q Again, Defendant's Exhibit 45, is that what that says?

A Yes, with exception to the spelling.

Q Oh, what did they misspell?

A Psychological.

Q I'll kill them.

MR. SCOTT: Let the record reflect, I was not the scribe.

Q (By Mr. Manasco.) Well, I'm sorry about that.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 45.

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 45 admitted into evidence.)

(By Mr. Manasco) Let's jump to 5-26-83, the committee report, at least it's stamped 5-26-83. Here we go, on this page, does it indicate whether or not the student did or did not meet the specific eligibility criteria for learning disabled and speech?

A Yes, it does.

Q It indicates that he did or did not?

A That he does meet the specific eligibility criteria.

[32] Q On the next page, does it indicate whether or not he needs special education services because of the handicapping conditions cited above?

A Yes, sir.

Q It indicates he does or does not—

A He does need.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 46.

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 46 admitted into evidence.)

Q (By Mr. Manasco) Let's jump to 5-24-84.
A You indicate 4-25.
Q Oh, 4-25, okay. Oh, I see there's actually three different dates and one's marked out. I'm really not sure what the date is, but one is 4-25-84; is that correct?
A That is correct.
Q Is this another one of the committee reports?
A Yes, sir.
Q Is there a notation in terms of what the committee decision was in paragraph three?
A The committee decided that this student needs special education services because of the handicapping conditions cited above.
[33] Q All right. Is there a handwritten notation in the—
A "Continues to need special education."
Q Is that what that says on Defendant's Exhibit 47?
A Yes.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 47.

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 47 admitted into evidence.)

Q (By Mr. Manasco) Ma'am, let's jump to 3-22-85 and ask if this is yet another committee report?
A Yes, sir.
Q All right. Now, in terms of assessment records, does it indicate abbreviation of WISC-R?

A Yes.
Q All right. What is that?
A The Weschler Intelligence Test or Scale—
Q All right—R—
A Revised.
Q I.Q. test?
A Yes.
Q All right. Does it indicate what his verbal I.Q. score is?
[34] A Yes, it does.
Q What is that?
A Seventy-five.
Q What's his performance scale?
A Eighty-four.
Q What's his full scale I.Q.?
A Seventy-eight.
Q Is that what it indicates in Defendant's Exhibit 48?
A Yes, it does.

MR. MANASCO: Offer into evidence Defendant's Exhibit 48.

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 48 admitted into evidence.)

Q (By Mr. Manasco) Now, ma'am, are you aware that 70 is the cut-off for clinical mental retardation?
A It depends upon the individual test.
Q So, if someone had an I.Q. of 70, and perhaps some other factors, they are clinically, or whatever the diagnosis, being mentally retarded; is that correct?

MR. SCOTT: I'm sorry. I didn't hear that answer.

THE WITNESS: I didn't answer.

[35] A I can only attest to what it states in the State Board of Education rules, which indicates two standard deviations below the mean on any tests on intelligence.

Q (By Mr. Manasco) So, in terms of what the clinical analysis is or whatever, you don't really want to testify to that?

A No, sir.

Q Fair enough. Let me jump to 5-28-86. Does that indicate in the handwritten notation that he is to be phased out of special ed?

A The student was recommended to be phased out of special ed at the end of 1986 school year.

Q Okay. Now, three pages later, where it has the committee considers whether he should—whether he met the goals and objectives and what program he should be in, it checks "regular education" only, right?

A Yes, sir.

Q There's also something written down under special education, it's marked out, correct?

A Yes, sir.

Q It also talks about the committee recommends placement in and a blank, that's marked out, correct?

A Yes, sir.

Q I didn't—that's on the form, right?

A That is correct.

[36] Q Okay.

A That's on the original.

Q All right. It indicates at the bottom of the last page in this whole packet—can you read that last sentence?

A The part that has been crossed out?

Q Uh-huh.

A "LaRoyce has failed most of his classes. He should be considered for self-contained placement." It says, "Disregard," and has the initials "ckp."

Q All that's marked out?

A Uh-huh.

Q Where it talks about failing should be considered for contained placement, marked out, right—

A Correct.

Q —disregard. Then the result of that is promotion?

A Correct.

Q All right. That's what Defendant's Exhibit 49 says; is that right?

A Yes.

MR. MANASCO: We'll offer into evidence Defendant's Exhibit 49.

MR. LUCAS: Same objection.

THE COURT: Overruled.

(Defendant's Exhibit Number 49 [37] admitted into evidence.)

Q (By Mr. Manasco) So, apparently, this comment about he's failed his classes and should be considered for self-contained placement, that's marked out as disregard, right?

A And initialed by the resource teacher.

Q Just like where it talks about whether he should be in regular or special, there's a notation under special and it's all marked out, too, right?

A That is correct.

Q So, they decided the best thing for LaRoyce is promotion, right?

A That seems to be the results of this committee, yes.

(Defendant's Exhibit 51 marked for identification.)

Q (By Mr. Manasco) Ma'am, let me show you what's been marked for identification as Defendant's Exhibit, 51 and ask if you recognize this document.

A Yes, I do.

Q What is that?

A That is a report of an individual score on the Texas Educational Assessment of Minimal Skills or TEAMS.

Q TEAMS is by—it's an abbreviation?

A Yes.

[38] Q What is that, ma'am?

A That's the state required test for graduation with state credit.

Q Did it have the results of this test and whether or not LaRoyce demonstrated a mastery of the minimum grade, nine, for mathematics, reading, and writing?

A This document indicates that he did not master the three areas.

Q All right. It specifically says no.

A No.

Q All right. That's what Defendant's Exhibit 50 says; is that correct?

A That's correct.

MR. MANASCO: We'd offer into evidence Defendant's Exhibits 50 and 51.

MR. LUCAS: Let me see which is which. We certainly have no objections to school records, number 51. On 50, Mr. Manasco's notes, we still object to.

THE COURT: I'll have to overrule that objection. Both documents will be admitted.

(Defendant's Exhibits Numbers 50 and 51 admitted into evidence.)

Q (By Mr. Manasco) So this is the whole test, right, or the test results?

A That is correct.

[39] Q So, when they ask whether or not someone has the minimum competency for mathematics, what does it say?

A No.

Q When asked if LaRoyce has the minimum competency for reading, what does it say?

A No.

Q When it says does LaRoyce have the minimum competency for writing, what does it say?

A No.

Q Now, ma'am, just like in life, there's sort of the good, bad and the ugly; is that right in many things?

A Yes, sir.

Q All right. Now, after you were out in the hall and you were reviewing the documents to make sure that they were authentic, Mr. Lucas had an opportunity to talk to you, although perhaps maybe he didn't tell you exactly who he was—but I mean, that's fine. You did not know his name, but he did have a chance to talk to you; is that correct?

A Yes, sir.

Q Mr. Lucas pointed out a couple of documents to you; is that correct—or asked about a certain—

A He asked me about specifics.

Q Okay. In terms of disciplinary problems?

A Disciplinary and attendance.

Q All right. Did you pull certain documents in [40] request to his response—or in response to his request?

A Yes, sir.

MR. MANASCO: Let's mark them.

(Defendant's Exhibits 52 through 56 marked for identification.)

Q (By Mr. Manasco) Ma'am, let me show you Defendant's Exhibits 52, 53, 54 and 55, and ask you if these are the documents you pulled in request to—in response to his request?

A Yes, sir.

Q Again, these are school records and the same manner form as everything else except they're on white paper as opposed to blue?

A Yes.

Q All right. I think I asked or mentioned, but in terms of putting on blue, that was just something you all did out there when I had them xeroxed; is that right?

A That is correct.

Q I didn't ask to be—well, you weren't there, but that's just done routinely?

A That is correct.

Q Not necessarily to differentiate between your records and the originals?

A No.

MR. MANASCO: We'll offer into evidence [41] Defendant's Exhibits 52, 53, 54, and 55.

MR. LUCAS: No objection.

THE COURT: Admitted.

(Defendant's Exhibits Numbers 52, 53, 54 and 55 admitted into evidence.)

Q (By Mr. Manasco) Let's talk about the ugly first. Can you read to the jury Defendant's Exhibit 52?

A This is a professional report by the associate school psychologist, Bethany Quinn, dated April 6th, 1982, concerning LaRoyce Smith at T.G. Terry school. "Referral for psychological consultation. LaRoyce has been implicated in numerous thefts at school this year, particularly of the speech clinician's purse. School contact with the parent indicated that LaRoyce has also been believed to be stealing at home. Speech clinician, Lori Greenberg, reported that the mother would like to have psychological consultation services with regard to acting out by taking things that don't belong to him. Family stresses are reported.

LaRoyce's usual behavior in class is exemplary and it has shocked school personnel that LaRoyce has been involved in stealing. He has admitted to theft and has cried when questioned about misbehavior."

Q Now, let's talk about the good. It says that his conduct prior to this has been exemplary; is that correct?

A Yes, sir.

[42] Q All right. It indicates that he admitted to taking the objects?

A It admitted to theft. It does not say what thefts.

Q It says his response when questioned was what?

A He cried.

Q Now, in terms of Defendant's Exhibits 53, 54, and 55, what are these?

A These are admission review and dismissal committee reports, annual reviews dated 1985, 1985, and 1986.

Q Whey did you pull those three documents out?

A Because they have notations concerning LaRoyce's behavior.

Q What do they say?

A In each instance, the question is behavioral progress. "Has student had discipline problems this year?" In each instances it was marked no.

Q So in '84, '85, and '86, did he have disciplinary problems in school, and they say no?

A That is correct.

MR. MANASCO: Thank you, ma'am. I'll pass the witness.

[43] CROSS-EXAMINATION

BY MR. LUCAS:

Q Ms. Pingle, I only have a few questions to ask you, ma'am. You and I were allowed to talk about how long this morning?

A About 20 seconds—30 seconds.

Q So, what you've testified to regarding these discipline exhibits, you didn't even tell me about them, did you?

A No, sir.

Q Okay. Just—like I say, I don't have that many questions, ma'am. Could you just tell us generally how many students in Dallas Independent School District are involved in some way in the special education program?

A About 13,000 each year.

Q This doesn't mean that these people are retarded or incompetent or anything like that, but they have some learning disabilities; is that a fair statement?

A It's a full continuum of the least significant to the most severe.

Q In fact, some of the kids are very good kids, they're rule-abiding kids that try hard, that study hard, that progress, that the school staff is able to work with and they work themselves out of this emotional problems or learning problems?

[44] A In some instances, yes, sir.

Q How many people are on the staff of the special ed program including all of the support staff and everybody in the DISD? Just an approximate number.

A About 800.

Q Eight hundred personnel—

A That includes teachers and teacher aides and their support staff.

Q —are involved in the special ed program in this school district?

A Yes, sir.

Q That's a vast—that's a huge number, isn't it?

A It's a large number, yes, sir.

Q I guess you could use more?

A Yes, sir. That is a decreasing number.

Q You and I agree that there's a big difference between learning disabilities and being street smart. You know

what I'm talking about, street smart; is that a fair statement? You can have problems learning in the schoolhouse and once you get out of the schoolhouse, you know everything that's going on around you and out on the streets. Do you hear me?

A Yes, there seems—that is—seems to be a reasonable statement.

Q The last—this TEAMS test result, do you know [45] what year that was, ma'am, what date it was?

A I believe it was dated 1987.

Q Okay.

A There's a date on it.

Q Well, there's not—is there a date—

A There's a date on the document, but not on the large document, not on Exhibit 50, but on 51.

Q If I can tamper with Number 50, what year is this?

A I would have to actually look at Number 51 to be sure, but I believe it said 1987 in the brief. Do I have it?

Q Well, I won't touch his exhibit, but did you bring certain other records with you that were not admitted into evidence?

A Yes, sir.

Q Okay. Could I *see* those, please?

A Certainly. In addition—we've admitted those. These are the remainder.

Q Again, in the 20 seconds that we talked, it's fair to say I have no idea what's in here, do I, Ma'am?

A No, you don't.

MR. LUCAS: Judge, there's no way I can look through this.

THE COURT: We'll take a break and give you an opportunity.

MR. LUCAS: I don't need a break. I'll just [46] go ahead and offer the exhibits, that way the jury would be allowed to—so if we could—

THE WITNESS: If I may, some of those are duplicates that have already been entered into evidence.

Q (By Mr. Lucas) Okay. Well, I'm sure they won't object to that.

(State's Exhibit 76 marked for identification.)

Q (By Mr. Lucas) Ma'am, if I can show you what's been marked State's Exhibit Number 76, and somehow we'll get the originals back to you and make copies.
A That is a copy.
Q That is a copy?
A This is.
Q All of this is a copy. State's Exhibit Number 76, the remainder of the records within the special ed department of the Dallas Independent School District regarding LaRoyce Smith, fair?
A Yes.

MR. LUCAS: We offer Exhibit 76.

MR. MANASCO: No objection.

THE COURT: They'll be admitted.

(State's Exhibit Number 76 admitted into evidence.)

MR. LUCAS: That way, they'll have ample [47] time, Your Honor. I appreciate it.

Q (By Mr. Lucas) Ma'am, as far as—and I've got a bundle of papers also, but are you familiar with certain forms called Student Referral to Principal's Office, are you familiar with that?
A Yes, I'm familiar with those.
Q Does your file include any of those?
A No, sir. Those are school records and not eligibility records.

Q So regarding specific referrals to the principal or assistant principal or any other administrator within each individual school, you don't have those records, I take it.

A No, sir.

Q Are you even aware of incidents that took place -- specific incidents of misconduct?

A No, sir.

Q So, if someone told you LaRoyce Smith was a model student or, on the other extreme, rowdy as possible student, you don't know that?

A No, sir.

Q You're just dealing within your expertise, and that being special ed?

A That is correct.

MR. LUCAS: We thank you. We pass the witness, Your Honor.

[48] REDIRECT EXAMINATION

BY MR. MANASCO:

Q Ma'am, Mr. Lucas said he talked to you about 20 seconds. Has he called you out there at the school anytime from January 7th up to this time, ma'am?

A No, sir.

Q Have you heard from Mr. Nancarrow or Ms. McDaniel saying, "Well, gee, did he have any kind of problems in school?"

A No, sir, I have not.

Q Did any of their investigators in this capital murder case come out there like I did and go through the files, to your knowledge?

A Not to my knowledge.

Q Did the DeSoto Police Department come out there, say, "Well, ma'am, let's check him out and *see* if there's something wrong here or not"?

A Not to my knowledge.
Q What about the Dallas Police Department?
A No, sir.
Q So, in terms of the 20 seconds, if they had wanted to, if they had cared, then they can check just like I did; would that be a fair statement?
A With the proper authorization, yes, sir.
Q That being a subpoena, correct?
[49] A Yes, sir.
Q You all would have shown him just like you showed me?
A Yes, sir.

MR. MANASCO: Thank you, ma'am.

RECROSS-EXAMINATION

BY MR. LUCAS:

Q Ms. Pingle, now the jury has the entire files so they know everything that you would know about this case; is that correct?
A That is correct.

MR. LUCAS: Thank you, ma'am.

MR. MANASCO: Your Honor, I'll pass the witness. May this witness be excused?

THE COURT: Any objections?

MR. LUCAS: No objections.

THE COURT: You can return home or to your place of business.

* * *

Punishment Phase Trial Testimony Excerpts
Vol. XXXII: 74 (Goffney, Kristi)

MR. MANASCO: Your Honor, the defense would call Kristi Goffney.

KRISTI GOFFNEY, the witness hereinbefore named, having been previously cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO

Q Would you state your name, please?

[74] A Goffney, G-o-f-f-n-e-y.

Q Ms. Goffney, you testified before the jury, and it's obvious, you can date pretty much who you want to; is that right?

A Yes.

Q So, I take it that LaRoyce is what appears to be equal intelligence to you, you all are able to communicate, aren't you?

A Yes.

Q That's certainly above average in my opinion. Is that your opinion, also?

A Yes.

Q That's—he's able to communicate about what's going on in your life, your part of town, the city we all live in, whatever; is that correct?

A Yes.

Q I mean, you wouldn't date anyone that wasn't that way, would you, ma'am?

A No, I wouldn't.

MR. LUCAS: That's all we have. We pass the witness.

MR. MANASCO: No other questions.

THE COURT: You can step down.

Punishment Phase Trial Testimony Excerpts
Vol. XXXII: 78 (Goffney, Meg)

(Witness sworn.)

MEG GOFFNEY, the witness hereinbefore named, having been cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please, ma'am?

A Meg Goffney.

Q Ms. Goffney, are you the mother of Kristi, the young lady that just got through testifying?

A Yes, I am.

Q I just got a couple of questions for you, ma'am. Obviously, it's a situation where Kristi and LaRoyce or Trody are engaged; is that correct?

A That's correct.

Q All right. Have you ever know Trody or LaRoyce to be violent toward your daughter?

A No, I haven't.

Q I mean, if he was hitting your daughter and knocking her on the side of the head, would you put up with that for one moment? [78] like he was the type of person that would be totally interested in anyone he felt was a friend, from his sister on down, whatever. He would give his all for whatever without thinking possibly sometimes.

Q. Okay. Sometimes giving his all to his friends might work to his detriment?

A It tends to do that lots of times. Yes, in this case.

MR. MANASCO: Thank you, ma'am. That's all I've got.

CROSS-EXAMINATION

BY MR. LUCAS:

Q Ms. Goffney, I guess, then, you would agree with your daughter that LaRoyce is above average intelligence?

A I would say he is a person who has an intelligence capable of understanding and learning, yes.

Q I don't know if that answers my question or not. You wouldn't want your daughter going with anyone, much less being engaged, to just anyone. So, does he appear to be average or above average intelligence, in your opinion?

A I would say he has average intelligence, yes, sir.

Q Okay. He's able to turn on the charm, isn't he towards you? Has he ever used any profanity towards you, ma'am?

Punishment Phase Trial Testimony Excerpts
Vol. XXXII: 88-91 (Wilson)

MR. MANASCO: The defense would call Myron Wilson.

(Witness sworn.)

MYRON WILSON, the witness hereinbefore named, having been cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please, sir?
A Yes, my name is Myron Wilson.
Q Mr. Wilson, how old are you?
A Twenty-nine.
Q Where do you work?
A United Parcel Service.
[89] Q How long have you worked there?
A Ten and a half years.
Q Are you a married man or single?
A Single.
Q How do you know LaRoyce or Trody?
A He's my brother.
Q Even though you all are, what, about nine years age difference—
A It will be ten on August 28th, that's my birthday.
Q That's my birthday, too. Did you all grow up in the same household some, then?
A Yes, sir.
Q But you're considerably older than Trody? A Yes, sir.
Q All right. Let me ask you, Mr. Wilson, if you were aware of the situation going on in the family where Trody's daddy was using crack cocaine?
A Yes, I was.

Q Tell the jury about that, what you know.

Q Well, he was the type individual that he likes to go out and ride the motorcycles and stay out and hang out all night. My mom was the provider. She would try to go to work. I would let her use my cars some days to go to work, and I would stay there and watch Trody and my little sister, Veta. He wouldn't come home for two or three days. My mama just [90] kind of got fed up with it and she started to, you know, telling him, you know, that he had to leave, and he kind of got on cocaine and drug abuse. It was just a number of things that started kind of affecting the family.

Q When you say affecting, what do you mean by that, sir?

A Well, it kind of took it's toll on my brother and my sister.

Q Are you talking about Trody?

A Yes, sir.

Q Tell us about this toll it took on your brother and sister.

A Well, he just didn't appreciate how he was doing things, that when he would come home after two or three days when he would come to the house and how he would talk to my mom. He's just the type person, he just didn't want no individual to get abused, that's the type person he was.

Q Are you talking about Trody?

A Yes, sir.

Q Are you the man that your mama had to take stuff over to hide so that your daddy wouldn't sell it for crack?

A Yes, sir.

Q Do you remember anything in particular that your mama had to bring over so that she could keep it away from your daddy?

[91] A Well, she brought the V.C.R., the microwave, and that stuff that you buy from Tupperware or whatever, this place she used to sell stuff for.

Q That was so it wouldn't be sold away?

A Yeah, so it wouldn't be sold.

Q Now, the prosecutor might pooh-pooh all this, but it's a situation where you know it had an affect on your family?

A Yes, sir.

MR. MANASCO: I'll pass the witness.

MR. LUCAS: We have no questions of the brother, Your Honor.

THE COURT: Thank you, sir. You can step down.

Punishment Phase Trial Testimony Excerpts
Vol. XXXII: 91-93 (Ellis)

MR. MANASCO: I'll pass the witness.

MR. LUCAS: We have no questions of the brother, Your Honor.

THE COURT: Thank you, sir. You can step down.

MR. MANASCO: Your Honor, we call Dorothy Ellis.

DOROTHY FAYE ELLIS, the witness hereinbefore named, having been previously cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. MANASCO:

Q Would you state your name, please, ma'am?
[92] A My name is Dorothy Faye Ellis.
Q All right. Ms. Ellis, can you tell the jury how you know LaRoyce Smith?
A How I know him?
Q Yes, ma'am.
A Oh, I've been knowing LaRoyce before his mother was pregnant with him, and then when she had him, he's just like a child of mine.
Q Was LaRoyce the kind of child that was a mean and cruel to animals and would torture them and things like that when he was growing up?
A No.
Q What kind of a child was LaRoyce?
A Liked to play.
Q Like most kids?
A Loved to play, loved to eat.
Q Well, okay. Did you know the family during the period of time where Johnnie Mae, his mama, was having problems with his daddy?

A Yes.

Q Could you tell the jury whether or not that had any influence on the family or was it just something like no big deal?

A Oh, it affected him, it affected him real bad.

Q Well, tell us about that.

[93] A Well, because his dad would sell all the stuff and his mama had to be the mama and the daddy, you know, go to work. Things we used to go out to eat and do, well, you know, she had to pay the bill if we go out to eat like we used to do.

Q Have you ever seen LaRoyce around children, ma'am?

A Yes.

Q Tell us about that.

A Well, Christmas Day we was all over my grandchildren —I have six grandchildren—he over there, playing with them, giving them pecans, showing us what he got for Christmas, playing with them. He played—I got a year and a half old grandbaby, and he just played with that baby.

Q Is it a situation where he appeared to definitely enjoy being around children?

A Yes.

Q Is this something that he's just turning on the charm because he thinks this baby might be of some benefit to him in the future?

A No, he just liked to play. He like to play with all my children, even my grown children, he play with them.

Q Is LaRoyce some kind of an evil monster that the only way we can take care of him is to kill him, ma'am?

A No. No, he don't need to be killed.

MR. MANASCO: Thank you, ma'am. I'll pass

Punishment Phase Jury Instructions
[from Transcript Vol. I, 112-119]

IN THE 265TH JUDICIAL DISTRICT
COURT OF DALLAS COUNTY, TEXAS
JANUARY TERM, 1991

No. F91-22803-TR

THE STATE OF TEXAS,

VS.

LAROYCE LATHAIR SMITH.

MEMBERS OF THE JURY:

By the verdict you have returned in this case, you have found the Defendant, LaRoyce Lathair Smith, guilty of the offense of capital murder, as charged in the indictment. It is now necessary for you to determine from all the evidence in this case the answers to certain questions called "Special Issues" in this charge.

Our law provides that the punishment for the offense of capital murder in this state is death or by confinement in the Institutional Division of the Texas Department of Criminal Justice for life.

You are instructed that you may consider all the evidence submitted to you in the full trial of this case; that is, all the evidence submitted before you in the trial of the first part of this case where you were called on to decide the guilt or innocence of the Defendant, and in the second part of the trial where you are called on to answer Special Issues. As in the first part of this trial, it is up to the jury to determine the

weight and credibility of the evidence, if any, and its bearing, if any, to the Special Issues being considered by the jury.

You are further instructed that in answering the Special Issues in this charge relating to punishment, you must not consider the instructions given you in the guilt/innocence phase of the trial that relate to the law of parties and the responsibility of parties for the acts of others in the commission of offenses. In this punishment phase of trial, you shall consider only the conduct of LaRoyce Lathair Smith, the Defendant, and no other, in determining what his punishment shall be.

The burden of proof is on the State to prove each Special Issue submitted to you beyond a reasonable doubt. If the State does not prove an issue beyond a reasonable doubt, or if you have a reasonable doubt about any issue, then you shall answer that Special Issue "No."

You are instructed that you may not answer a Special Issue "Yes" unless the jury unanimously concurs, and in such event, the verdict form for such Special Issue shall be signed by the foreman. You may not answer a Special Issue "No" unless 10 or more jurors concur, and in such event, the foreman shall sign the verdict form.

You are further instructed that if any juror, after due deliberation and considering all the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes," then such juror should vote "No" to that Special Issue.

You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or

may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.

In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve.

If the jury returns an affirmative finding on each of the Special Issues submitted, the Court shall sentence the Defendant to death. If the jury returns a negative finding on any of the Special Issues submitted, the Court shall sentence the Defendant to confinement in the Institutional Division of the Texas Department of Criminal Justice for life.

You are instructed that certain evidence has been admitted before you of criminal conduct and/or bad acts committed by the Defendant other than the offense for which he is on trial. In that regard, you are instructed that you may not consider such evidence for any purpose unless you first find and believe from the evidence beyond a reasonable doubt that the Defendant committed said criminal conduct or bad acts. If you do not so find or believe from the evidence, you must wholly disregard such evidence. You may consider any defenses the Defendant might have to any offenses.

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a right accorded a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him.

In this case, the Defendant has elected not to testify in this phase of the case, and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the Defendant.

The general purposes of the Penal Code of the State of Texas are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate. To this end, the provisions of this code are intended, and shall be construed, to achieve the following objectives:

(1) To insure the public safety through:

(a) the deterrent influence of the penalties hereinafter provided;

(b) the rehabilitation of those convicted of violations of this code; and

(c) such punishment as may be necessary to prevent likely recurrence of criminal behavior;

(2) By definition and grading of offenses to give fair warning of what is prohibited and of the consequences of violation;

(3) To prescribe penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders;

(4) To safeguard conduct that is without guilt from condemnation as criminal;

(5) To guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses; and

(6) To define the scope of state interest in law enforcement against specific offenses and to systematize the exercise of state criminal jurisdiction.

[illegible]

influenced in any degree whatsoever by what you may think or surmise the opinion of the Court to be. The Court has no right by any word or any act to indicate any opinion respecting any matter of fact involved in this case, nor to indicate any desire respecting its outcome. The Court has not intended to express any opinion upon any matter of fact in this case, and if you have observed anything which you have or may interpret as the Court's opinion upon any matter of fact in this case, you must wholly disregard it.

You are further instructed that your verdict shall be arrived at by due deliberation and not by drawing lots or by any other method of chance.

You are further instructed that in determining the punishment in this case, you are not to discuss among yourselves how long the Defendant will be required to serve any sentence you decide to impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and the weight to be given the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

/s/ Keith Dean
KEITH DEAN, Judge
Dallas County, Texas

State's Closing at Punishment
Excerpts: Vol XXXIII: 20, 24-25, 27, 32, 84

CLOSING ARGUMENT

BY MS. MCDANIEL:

Members of the jury, it's been a while since Mr. Nancarrow and I spoke with you, and you know that when we talked to you—and let me, first of all, tell you that I thank you for your time and attention in this trial.

Now, when we talked to you on voir dire, we talked to you about—and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, "Mr. Nancarrow, Ms. McDaniel, if you prove to me that the answers to those special issues should be yes, then I can answer them yes." If you wavered, if you hesitated one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now.

Now, let's talk about these special issues. Let's talk about special issue number one. Was the conduct of the defendant in causing the death of Jennifer Soto done deliberately and with the reasonable expectation of the death of Jennifer So to would occur—would result? Is there anybody here who would seriously contend that he did not do this deliberately? Well, let's look at it, let's talk about it.

Let's talk about not only what caused her death, but also the surrounding facts, the facts that show what happened before, and what happened, and what happened after. Planned? Well, you know from the testimony of the witnesses that he had worked at the Taco Bell before. He knew Jennifer

[24] I tell you? He comes back to the car after he's pistol whipped her, shot her with a gun, stabbed her with a knife

multiple times, he comes back to the car holding that knife—what does little Dweilon tell you? I think his words were, "Well, he was like calm when he said, 'She knew me. I had to cut her throat. She knew me.' He was like calm."

Now, this is deliberate. It's not accident. It's not mistake. It is intentional and deliberate, and you all told us that when you saw that, what that meaning of the word "deliberate" meant, that you would know it.

You know, we couldn't get into the facts of this case on voir dire, but if we could have, we couldn't have given you a better example of what deliberate is. This is it. I'm going to ask that you answer that question number one yes because the evidence demands that you answer it yes, not only intentional, but deliberate. Wasn't enough to shoot her once, wasn't enough to pistol whip her. No, had to proceed and do this to her. Turned her into a bloody corpse.

Question number two: Is there a probability that the defendant will commit criminal acts of violence in the future that will constitute a continuing threat to society? When we talked to you on voir dire about this question, you saw the distinction between—in the word "probability", you told us that you wouldn't require us to prove it to you to a certainty, that you understood the word "probability", and [25] that it had a certain meaning, and that you would not require us to prove that he would go out and commit another murder or another criminal act of violence, but there's a probability that he would. You also—and every one of you told us when we asked you could you find the answer to that question number two yes just based on one act alone. In other words, could you find the answer to be yes, could you learn enough about an individual, enough information, to say, yes, he will—there's a probability that he will commit criminal acts of violence in the future that would constitute a continuing threat to society.

Well, I submit to you that—let's talk about this act. Let's talk about the before, the during, and the after. Well, you know, and we've talked about how he planned it, he prepared it, he talked about it. "You going to do this for me, Kevin? We're going to hit the Taco Bell." You know that he got—provided the weapon, the gun. That was his doing. You know that they had an opportunity not to commit the offense, and they didn't. He had the alternative to turn around, "Hey, let's go on home. We don't need any part of this." But, no, because of this man, Jennifer Soto is dead. "Got to do it. We've got to do it." You know that he said on the way there, Dweion told you, "If she sees my face, I'll have to kill her." Premeditated? Knew what he was going to do when he went in there? Yeah, he didn't do anything to

[27] follow them into an apartment complex. He was so upset about what he had done that he ran. You know that although his—everybody who wasn't apprehended that night turned themselves in the next day, but not LaRoyce Smith, no. Instead he—after the offense when he goes over to his friend David Shawn Harrison's house, and what does he tell David? "Well, we robbed a Grandy's in DeSoto and we got $5,000 and we had to kill a girl. We had to shoot a girl." Did he show any re-morse about that? No. He's more interested in getting rid of this bloody jacket, give that to David Harrison. Gets rid of that.

We know that the next day he was just going about his business and goes over to his girlfriend's house and hides the jacket underneath the bed. Had to raise the bedskirt, and there it was, blood on the jacket. You know that that night—well, we didn't hear anything from his mother about how he was so upset when he came in that night, the same day this happened. No, they just went about washing the clothes—washing his clothes. It was washing time. You know, he was really upset about this.

You said you could answer that question number two yes just based on one act alone. Well, we brought you more than that. What did you hear about this man? You heard that he was—he had an aggravated assault case and we brought you the evidence on that case.

[32] to January 22, 1991; boom, January 7, 1991, he has elevated his conduct to the ultimate serious offense of the laws of this state, capital murder. If we had only known what we know now about him. If Jennifer Soto had only known about him what we know now about LaRoyce Smith, maybe she could have protected herself, maybe we could have protected her from him, but we do know now what we know. They can't wish it away or wash it away because it's here and you heard about it.

Members of the jury, the defendant, by his own conduct, has dictated the answer to question number two. By his own

CLOSING ARGUMENT

BY MR. LUCAS:

Ladies and gentlemen, we've reached that phase in the trial—and you'll be glad to know that I'm probably going to be the last person to talk to you. There are no more witnesses. There are no more arguments. I'm allowed somewhere around 30 minutes to just share my views with you, answer a few of the things that Mr. Manasco said that I feel are important and relevant, just let you know a little bit how I feel about the facts of the case.

Mr. Manasco has managed to call every witness that hurts them a liar. That goes from every one of the kids that was in the automobile to the school teachers. I mean, they have some type of vendetta against LaRoyce Smith. Everyone

. . . .

[84] shows that this man is a sadistic, brutal killer. He can turn it on, he can turn it off. He can be so lovely around his kinfolks, no problem there, but when he gets out on the street, he is LaRoyce Smith. What did he say one year—one year on the probation, "One year is not going to hold back Big T, big trouble." Remember that? He said that at the elevator that Chris Standmier heard. Chris Standmier's mother comes over to talk to his mother just as adults, Trody rolls through the room and says, "I don't know what she's talking about. She's crazy." Accept responsibility? Absolutely not. Pass it on to some other people? Absolutely, that's what he's going to do.

Ladies and gentlemen, I'm going to be sitting down in just a few moments. The case is going to be in your hands. When we talked to you on jury selection, we talked to you -we told you at that time what we felt the facts were going to call for, that this was an individual where the ultimate punishment is earned by him over the years. The brutality of this particular case standing alone, if you absolutely knew nothing else about LaRoyce Smith and his background, the brutality alone calls for the death penalty in this case. So, please, this is the time to have compassion, not for this individual, not for this outlaw, but for the victim and the victim's family. We'd ask you to consider that.

Thank you, Your Honor.

Defense Closing at Punishment
Excerpts: Vol. XXXIII: 43-45; 55-58; 69

CLOSING ARGUMENT

BY MR. MANASCO:

Members of the jury, I told you all on voir dire that if you would listen to the evidence, you paid attention and applied the facts to the evidence, then I wouldn't have any quarrel with you regardless of what your verdict would be. I know by the time that you've spent deliberating, I know by the questions that you sent out that you did that, and I will stand by my word. You have an awesome responsibility, because you've literally got someone's life in your hands. I have an awesome responsibility, because if I have forgotten something, then this man may die. It's not a T.V. show. It's not a game. I think it is important that you consider the role that LaRoyce Smith had.

Now, Ms. McDaniel makes it all cut and dry. I think we are in an unfortunate position that we don't know what you were thinking. We don't know, because of the way the charge is so constructed, that you believe that LaRoyce is the one who cut and stabbed and shot, and that all this about Kevin Shaw I've been talking about is just so much smoke.

. . . .

[43] shoes?" Who had killing on their mind from the beginning to the end? At the Shamrock station, "I could have robbed that whore." Who has killing on their mind at the end? "Sure hope I don't have to kill no fucking hero, too." Who has killing on their mind inside the Taco Bell? They don't know. Even their own witness says—Dweilon, I think his name is—"We should all be in the same boat, to be fair." To be fair. Limited dis-cretion? You know, put everyone in the boat, you don't need a single needle to execute. You need

them all lined up and have some kind of electric sofa, is what it would take in this case.

There's two special issues. I want to talk about both of them. The first is deliberate. Was it done deliberately? The expectation that she would die. In voir dire, you all told us that you understood it meant something more than intentional, otherwise, there would be no point to the question. Some of you said you were looking for premeditation; they're going to do it no matter what, going to kill before they ever went in.

Now, the prosecutor, Ms. McDaniel, talks about that "Well, if she sees my face, I'm going to kill her." Now, we took care of that in the guilt/innocence. Remember when I brought it up, I said, "Now, that sounds bad, but, sir, look at your statement. At least in terms of she, didn't you use the word 'they?'" There was no evidence he knew she was [44] working there. He said, "Yeah," and that is from the one person that did not even know—that swore to you Kevin did not even go in the place until after the shooting. Nancarrow tells you, "They're all hedging." He tells you that. "They are all lying to you." Even their own witness, I believe it's two of them, said, "No, LaRoyce did not say he was going to kill anyone. He talked about, 'Well, if there's some trouble, we might bribe them.'" There's talk about a freezer. Reasonable doubt? Yes.

You know that Nickles Lewis told the truth when he said, "I figure Kevin blew it." It was never intended to be a murder. Premeditation of robbery? No question. No question to anyone that's heard one day of this case would know that. Premeditation for murder? The actions were not deliberate, they were chaotic. They stay out there 45 minutes to an hour trying to decide how to get in. Is that the cold, calculating plan that Ms. McDaniel tells you about? They get in the car, leave and start to come back. Is that someone who just—it's so set in concrete? If it was so planned and if LaRoyce is such

a bad guy with that Uzi-like gun, why didn't he have the Uzi? If those were his bullets instead of Nick's, like Nick has pled to the gun charge across the hall, why didn't he have the .38? If it was so planned, so deliberate, why did they have to risk going to see if someone else was there and that would give them a gun?

[45] Deliberately causing death. It's not pretty, but I want you all to take a look at that autopsy report that's been admitted. It says the stab wound to the head, it's one-half inch deep; the stab wound to the chest, three inches deep; the leg is the deepest one, five and a quarter. He says that's the fatty part of a person's body, four inches of fat. The neck, even the fatal—if the gunshot didn't do it—the fatal stroke, three inches deep. You all have seen that knife. You take it back to that room. Deliberate? If he wanted to make sure she was dead, that would have been stuck through her to the hilt. You're not going to have any three inches. That could go through her almost a foot.

The gunshot, even Travis Brown says, "I didn't even think she had been shot." Certainly at the time, it did not appear that that was a fatal wound. It's not to reward anyone. You're not supposed to give brownie points to LaRoyce or Kevin, or whoever killed that girl, because he didn't stick it in her as far as he could, but there's scientific evidence showing the death. You know that if a person wanted to be sure, they would be sure. That knife wound would have punctured every major organ in that poor girl's body.

Question two. Continuing acts of violence. Is he a continuing threat to society? On voir dire, almost all of you told us that you were looking for someone who had a long criminal record, that's in and out of the penitentiary,

. . . .

[55] record of about six months. You have every police officer that has testified badly saying, "He didn't give me any

problems." He doesn't have a problem with law enforcement on the street, in the jail, and it's a reasonable deduction from the evidence he sure won't in the penitentiary. Mr. Lucas will say, "Well, there's no guarantee. We can't even guarantee what our kids are doing the next day, much less what someone else will do." That's true, but that is not the standard that you're at. What the question is, is whether or not there is a reasonable doubt that he will not be a continuing threat to society. The society you're going to place him in is the penitentiary. You have a reasonable doubt. You have a track record.

Remember, we even told you that LaRoyce—at the time of the trial, during the voir dire, not when these fine bailiffs were here, but other bailiffs, he was all by himself. He could have got up and ran away, probably would have been caught, I guess, but even when there's not anyone around, there is no authority problems with the law enforcement.

I want to talk to you about mitigating evidence. Mitigating evidence is that evidence that reduces the defendant's personal or moral culpability and may include, but is not limited to, any aspect of his character, record, background, or circumstances of the offense. It may go to one of the special issues, it may not, but the Court tells you and [56] that the State has a burden—that if you think that he should not die, you are to put "no" in one of the spaces, that the State has the burden of proof beyond a reasonable doubt to convince each and every one of you that he should still die.

Now, mitigating evidence comes to you from the witnesses. Now, the State wants to think about things in terms of black and white, you know. If you're a burglar, well, you're a burglar then and you're a burglar now and you'll always be a burglar. They're not interested in finding out about LaRoyce Smith. Example: Special education. What does Lucas say? "Well, ma'am, I talked to you about 20 seconds out there." I said, "Ma'am, in the six months that he's been preparing this

case, he could have gone out there just like I did. Did any of those lawyers go out there?" "No." "Any of the investigators?" "No." They don't want to know.

What about the neighbor, Mr. Miles, the next door neighbor. "Mr. Miles, has the State ever contacted you?" "No." The man that lives next door to him, they did not even talk to. They don't even want to find out from the next door neighbor about the man they want to kill. They do not want to think that there's something else, that there's nuances or shades of gray. You know that every dirty piece of rock they can find, piece of material on his life, they can bring up to [57] you. There's no juvenile record, never spent a day in the penitentiary. You don't know about rehabilitation. No guarantee? That's right. But you know up to now every time he's been incarcerated, he's not given them one, not even so much as sneeze on an officer or, you know, he would have been up there in a New York minute.

I want to talk to you about mitigating evidence. First of all, about special education. Now, from 1978, there's evidence—now, it's not like he had been plotting and planning since 1978 that maybe one day he'll do something and that it will be good to have this stuff. That's the way he is. The evidence we have, medical diagnosis, slow learner, may be organic. Objective test data, I.Q. 78. He is eight points from being mentally retarded. Why do you think LaRoyce gets along so well with kids? Because he's like one, that's why. Because he's like one. He certainly didn't go to El Centro like Kevin Shaw, now, did he? It shows he is not a leader, it shows he's a follower, just like the school did way back then. "Get your boy to chill out."

Look at the record, then, in '86, still having problems, mark through promote. You all heard of social promotion. It's probably a football promotion, too. Family problems. Lucas will say, "Well, we've all had problems and many of us have been raised by single parents." That's true, but how many of

us have had our daddies sell our appliances [58] for crack, that we've had to take and hide our V.C.R.'s, our T.V.'s, our freezers, so our own daddy wouldn't go and sell it for crack? You know that that has an impact on someone. It has an impact on how they act in school. Now, Lucas will say, "Well, you blame school, you blame the parents. We're doing the best we can." We're not blaming the school, and we're not blaming the parents. We're telling you that it's something that happened and it's something that you should consider because it's not black and white.

I want to talk to you about character traits, what LaRoyce is really like. Now, Lucas will tell you, "Well, all this, I would hope, we can bring our family and friends if we get in trouble." We probably would hope that. You know what the truth of the matter is? You know how hard it is to get someone to come down to the courthouse from across town, much less flying from Oklahoma City. These people voluntarily came down. They took off from work. They rearranged their schedules. They came in from out of town because they had something to tell you that the State does not know. Who are the people that know you? I would hope it would come as no surprise that most of the people that you know are either your family or your friends. If you're old enough to have a track record, your people in your career. That's interesting. Interesting.

Work. You know LaRoyce has had a number of jobs.

. . . .

[69] not one disciplinary action. You know there's a reasonable doubt. There's a place for him all right, it's not out on the streets of Dallas, it's in the, penitentiary, but it's not strapped to that gurney.

The State of Texas must prove to you beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence. You shall answer no to one of the issues

to give effect to your meaning. LaRoyce's life is in your hands, no question about that. There's a lot more than that. The State doesn't care about his life, didn't investigate, doesn't mean anything. These people didn't get up here because they didn't have anything to do and wanted to have a quick thrill in the courtroom. They testified and came down here because they wanted to tell you there is something worth saving. Aids Fred Cox. A monster? Tells the sister, "Don't do what I did." Helps his neighbors without asking for money. He's not turning on the charm. That's LaRoyce.

You know, a long time ago when this Constitution—when everything was being built trying to set up this country, they tried to decide powers, who was going to do what. It was said that when they got to war powers, they had a big discussion. They tried to say, "Well, you know, maybe we shouldn't have all these generals deciding who should go to war." The phrase that was used is, "Maybe war is too important for warriors." Sure enough, they gave the power to

Jury Verdict Form
[from Transcript Vol. I, 120]

IN THE 265TH JUDICIAL DISTRICT
COURT OF DALLAS COUNTY, TEXAS
JANUARY TERM, 1991

NO. F91-22803-TR

THE STATE OF TEXAS,

VS.

LAROYCE LATHAIR SMITH.

SPECIAL VERDICT NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, LaRoyce Lathair Smith, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict, you will answer "Yes" or "No."

ANSWER: Yes

/s/ [Illegible]
FOREMAN

SPECIAL VERDICT NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, LaRoyce Lathair Smith, would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict, you will answer "Yes" or "No."

ANSWER: YES

/s/ [Illegible]
FOREMAN

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	

Appellant's Brief on Direct Appeal
Excerpt: POE 5-6, pp. 23-31

IN THE
COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

[Filed APR 20, 1992]

Cause No. 71,333

LAROYCE LATHAIR SMITH,
Appellant,

VS.

THE STATE OF TEXAS,
Appellee.

On appeal from the judgment of conviction rendered in Cause Number F91-22803-R in the 265th Judicial District Court of Dallas County, Texas.

BRIEF FOR THE APPELLANT

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* * * *

APPELLANT'S POINT OF ERROR NO. FIVE

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY'S AFFIRMATIVE ANSWER TO SPECIAL ISSUE NO. TWO.

The jury answered the second special issue in the affirmative. Appellant maintains that the evidence is insufficient to support this finding.

The State must prove each punishment issue submitted beyond a reasonable doubt. TEX. CODE CRIM. PROC. Art. 37.071 (c) (repealed); *O'Bryan v. State*, 591 S.W.2d 464, 479 (Tex. Crim. App. 1979), *cert. denied*, 446 U.S. 988 (1980).

The standard of review is whether, viewing the evidence in the light most favorable to the verdict, such evidence would persuade any rational trier of fact to answer the issue in the affirmative. *Stoker v. State*, 788 S.W.2d 1 (Tex. Crim. App. 1989), *cert. denied*, 111 S.Ct. 371 (1990); *Burns v. State*, 761 S.W.2d 353 (Tex. Crim. App. 1988) and *Keeton v. State*, 724 S.W.2d 58 (Tex. Crim. App. 1987). A review of the entire record is necessary because the jury is entitled to consider the evidence presented at the guilt innocence phase as well as the punishment phase when answering the issues. *Black v. State*, 816 S.W.2d 350 (Tex. Crim. App. 1991); *Huffman v. State*, 746 S.W.2d 212, 223 (Tex. Crim. App. 1988); *Beltran v. State*, 728 S.W.2d 382 (Tex. Crim. App. 1987); and *Livingston v. State*, 739 S.W.2d 311 (Tex. Crim. App. 1987), *cert. denied*, 487 U.S. 1210 (1988).

Among the factors a jury may consider when answering the second issue are:

1. The circumstances of the capital offense, including the defendant's state of mind and whether he or she was working alone or with other parties;

2. The calculated nature of the defendant's acts;

3. The forethought and deliberateness exhibited by the crime's execution;

4. The existence of a prior criminal record, and the severity of the prior crimes;

5. The defendant's age and personal circumstances at the time of the offense;

6. Whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;

7. Psychiatric evidence; and

8. Character evidence.

Keeton, 724 S.W.2d at 61. Additionally, the circumstances of the offense alone may be sufficient to support the jury's affirmative answer to the second issue. *Alexander v. State*, 740 S.W.2d 749, 761 (Tex. Crim. App. 1987).

A. The Facts of the Offense:

Appellant submits that the facts and circumstances of the offense are not alone sufficient to support the verdict on the second special issue. Viewing the evidence in the light most favorable to the verdict, Appellant and several companions went to the Taco Bell at the very least with robbery in mind. Appellant stated that he might have to kill the decedent, whom he knew, if she could identify him; however, he also opined that her silence could be bought with a share of the proceeds of the robbery. According to Travis Brown, Appellant shot and stabbed the decedent after learning she could not open the safe.

It is true that this was a senseless murder, but this fact is true of every murder in the course of a robbery. The facts of this offense, standing alone, do not carry the marks of a calculated and cold-blooded crime, such as in *O'Bryan*, 591 S.W.2d at 480, where the defendant for months planned the candy poisoning of his own child to collect life insurance

proceeds. To hold that the facts of this offense, standing alone, would sustain an affirmative answer to special issue no. two, would mean that virtually every murder in the course of a robbery would warrant the death penalty. Such a construction would destroy the purpose of the punishment stage in capital cases, which is to provide a reasonable and controlled decision on whether the death penalty should be imposed, and to guard against its capricious and arbitrary imposition. See *Roney v. State*, 632 S.W.2d 598, 603 (Tex. Crim. App. 1982).

B. The Keeton Factors:

With respect to the first three *Keeton* factors, Appellant was working with several other parties. There was some forethought and deliberation attached to the offense. The record reflects that Appellant discussed the robbery and possible violence if he were recognized. According to Travis Brown, Appellant shot the decedent and then went looking for another weapon, a knife. Nevertheless, there was not an extensive degree of planning and forethought concerning the murder of the decedent.

The prior criminal record offered by the State is not indicative of future dangerousness. Appellant pleaded guilty to a misdemeanor assault on Christopher Standmier. The facts and circumstances of the offense do indicate some degree of violence; however, the incident appeared to have been generated by a quarrel over a girlfriend with animosity on both sides. This was not a random or unprovoked act of violence. Moreover, the fact remains that the State was willing to accept this as a misdemeanor offense.[3]

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[3] The State made much of the fact that the complainant agreed to a reduction in the offense because he was tired of leaving school to come to court. Nonetheless, the State at the time did not consider Appellant's conduct—which did not cause serious bodily injury—sufficiently serious to override the complainant's feelings and proceed with the felony prosecution.

Evidence was educed of Appellant's possession of cocaine. The State made some effort to show that his possession of what turned out to be 1/15 of a gram of cocaine was possession with intent to deliver; however, no violence attended this offense and the crime itself is not indicative of future dangerousness.

Appellant had no other criminal record. The State attempted to show that evidence of Appellant's future dangerousness could be found in his conduct at school. At the very least, this evidence was equivocal. One teacher testified that Appellant had threatened at least to "whip" him; he could not say with certainty that Appellant had threatened to kill him. Another teacher testified that Appellant had threatened to kill him; however, he did not inform authorities and no record of this alleged threat appeared in Appellant's school records. At all events, there is no evidence that Appellant ever attempted to carry out any of these alleged threats or actually committed any bodily harm to school officials.

The State produced evidence that Appellant had been referred for suspension and had a bad reputation for following school rules. Such evidence, however, falls short of proof of future dangerousness. Moreover, Appellant produced other school district employees and supervisors to show that he was not a violent troublemaker.

Finally, the State sought to prove that Appellant had possessed an automatic weapon or other weapon at school. While the evidence showed that Appellant's lockermate, Nickles Lewis, possessed a Tech 9 pistol, the State was unable to link this weapon to Appellant. Appellant was found in possession of .38 bullets and told a youth officer that they hadn't found his gun; however, the State never proved that Appellant had indeed possessed a weapon in school.

Appellant was nineteen years old at the time of the offense. He produced evidence that he was close to being mentally

retarded and at the very least had a history of learning disabilities. His evidence showed a history of family strain caused by his father, who sold the family's personal property to buy cocaine.

A minister testified that Appellant appeared sincerely remorseful over the circumstances of the decedent's death. This was corroborated by Appellant's testimony at the guilt stage where he told of his desire to write a letter to the decedent's family, an action his counsel did not feel was appropriate at the time. There was no evidence that Appellant had been boastful of his conduct or had created any problems while in confinement.

Concededly, the evidence fails to show that Appellant was under duress or the domination of another person. Of course, Appellant testified that the killing was the independent impulse of Kevin Shaw; however, it appears that the jury by its verdict rejected Appellant's version of the offense.

No psychiatric evidence was educed by the State to the effect that Appellant would constitute a future danger to society. Although such evidence is not essential, *Beltran v. State*, 728 S.W.2d at 390, the fact remains that there was no expert testimony before the jury indicating that Appellant would commit criminal acts of violence which would constitute a continuing threat to society.

The State did introduce some evidence that Appellant had a bad reputation for complying with school rules and had a bad reputation for being a rule-abiding person in school. The State did not, however, introduce any testimony that Appellant had a bad reputation in his community for being a peaceful and law-abiding person.

By contrast, Appellant presented several good character witnesses. Reverend Samuel Nicks testified that Appellant could be rehabilitated and constituted no future danger to society. Fred Cox testified that Appellant came to his aid

during an altercation where Cox had been set upon by boys from a rival school. Kristi Goffney, Appellant's fiancee, testified that Appellant had agreed to marry her after learning she was pregnant by him and he had been looking for work to support them. She further testified that she had never known Appellant to be violent.

Meg Goffney, Kristi's mother, testified that Appellant had never been violent to Kristi. She also related that Appellant had been a father figure to his sister, Veta, who had been giving the family some problems.

Robbie Johnson, a friend of Appellant testified that he had never known Appellant to be violent. Dorothy Ellis, a friend of the family who had known Appellant since birth, stated that he loved playing with children and "was not a monster who needed to be killed." (R. XXXII 93).

Charlotte Thompson testified that she tutored Appellant in school. She felt that Appellant was a salvageable person and had never known him to be violent. Appellant was supposed to be the best man at her wedding.

Tracy Reed, a legal assistant, testified that Appellant was a very helpful and giving person. She had Appellant babysit for her son. Ms. Reed testified that Appellant, if given a life sentence, would not constitute a threat to society.

James Miles, age 69, testified that he was Appellant's neighbor and Appellant had helped him many times. LaTonya Kerlin, who had dated Appellant's older brother, testified that when she was out of work, Appellant invited her to live with his family. She had not known Appellant to be violent with her children. According to the witness, Appellant had worked hard to support the family when his father had ceased supporting the family and stole family property to pay for his cocaine habit.

Gertha Williams was the mother of Adondra Williams, the subject of the dispute between Appellant and Christopher Standmier. Mrs. Williams testified that her daughter was the instigator of the trouble between Appellant and Standmier. She stated that Appellant had been thoughtful to her and was never violent toward her daughter. Mrs. Williams' husband, Benny Williams, testified that Appellant had been respectful of him and had never been violent toward his daughter.

Appellant's extensive character evidence, which essentially went unrebutted by the State, established that Appellant did not have a violent character and that the offense had been an aberration.

The State's evidence is support of special issue no. two is essentially the facts of the offense plus a confrontation and fight with another boy roughly his age. There was no extensive past violent conduct indicative of future violent tendencies. There was no psychiatric evidence or other testimony 'truly showing a bad reputation for obeying the law. Given the extensive character and mitigating evidence, it simply cannot be said that the State proved the second special issue beyond a reasonable doubt. Accordingly, Appellant prays that this point of error be sustained and the judgment be reformed to life imprisonment.

APPELLANT'S POINT OF ERROR NO. SIX

TEX. CODE CRIM. PROC. ART. 37.071 (REPEALED) IS UNCONSTITUTIONAL IN THAT IT PROVIDES NO EFFECTIVE VEHICLE FOR A JURY TO APPLY MITIGATING EVIDENCE

Prior to trial, Appellant filed a motion to have the trial court declare former Article 37.071 unconstitutional in that it provided no effective vehicle for a jury to apply mitigating evidence. The trial court denied this motion. (R.I 78).

The United States Supreme Court has held that the Constitution limits a State's ability to narrow a sentencer's

discretion to consider relevant evidence that might cause it to decline to impose the death sentence. *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756 (1987). *See also Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821 (1987).

In *Lockett v. Ohio*, 438 U.S. 536, 98 S.Ct. 2954 (1978), a plurality of the Supreme Court reversed the death sentence of the defendant. Under the state statute governing imposition of the death penalty, the trial judge was to impose the death sentence unless one of three statutorily defined mitigating circumstances was found to exist. Other, non-statutory mitigating factors could be considered in determining whether the statutory factors existed, they could not be used separately to justify imposition of a sentence less than death. The Supreme Court held that this limitation of the range of mitigating circumstances was incompatible with the requirements of the Eighth Amendment.

In *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982), a majority of the Supreme Court adopted the holding in *Lockett*. There the Supreme Court also vacated a death sentence for failure of the court to consider a mitigating factor within the confines of the state death penalty statute.

Similarly, in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986), the Court reversed a death sentence for failure of the trial court to admit certain mitigating evidence.

Finally, in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989), the Supreme Court held that there was an Eighth Amemdment violation where there was mitigating evidence not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, and the jury instructions would have provided the jury with no vehicle for expressing its reasoned moral response to that evidence.

Unfortunately, this Court has recently held in several cases that the second special issue of Article 37.071 provides an

adequate vehicle by which a jury can give effect to mitigating evidence of a defendant's background and character. The only evidence requiring a special issue appears to be evidence of mental retardation or voluntary intoxication. *See Lackey v. State*, 816 S.W.2d 392 (Tex. Crim. App. 1991); *Black v. State*, 816 S.W.2d 350 (Tex. Crim. App. 1991).

In these cases, by limiting the holding of *Penry* essentially to its particular facts, this Court has effectively narrowed the sentencer's discretion to consider relevant evidence that might cause it to decline to impose a death sentence. As Judge Clinton noted in his dissent in *Lackey*:

> But if *Penry* stands for anything, it is that Art. 37.071, by itself, is a constitutionally unreliable mechanism for determining that death is an appropriate penalty whenever evidence is proffered having mitigating potential that transcends its logical relevance to the special issues. That in its current form the statute fails to function adequately as a conduit for much of what the Supreme Court has identified as mitigating evidence, thus rendering it unconstitutional in application in many cases under *Lockett* and its progeny, including *Penry*, necessarily means it has only a limited utility. There is no escaping that.

Lackey, 816 S.W.2d at 404.

By its extremely narrow interpretation of the requirements of *Penry*, this Court has unconstitutionally narrowed the sentencer's discretion to consider relevant mitigating evidence with regard to imposition of the death penalty. The special issues of Article 37.071 do not in reality provide a vehicle for individualized consideration of the appropriateness of assessment of the death penalty and said article is unconstitutional as applied. Appellant urges that this Court reconsider its recent precedents and hold that former Article 37.071 is unconstitutional as applied.

Smith v. State, No. 71,333
(Tex. Crim. App. June 22, 1994) (unpub)

APPEAL FROM DALLAS COUNTY

No. 71,333

LAROYCE LATHAIR SMITH,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

OPINION

Appellant, Laroyce Lathair Smith, was convicted of capital murder. V.T.C.A., Penal Code, Section 19.03. At the punishment phase of appellant's trial, the jury affirmatively answered the special issues set forth in Article 37.071(b), V.A.C.C.P. The trial judge then sentenced appellant to death as required by Article 37.071(e), V.A.C.C.P. Direct appeal to this Court was then automatic. Article 37.071(h), V.A.C.C.P. We will affirm appellant's conviction and sentence of death.

Appellant raises eight points of error, including a challenge to the sufficiency of the evidence at the punishment phase of the trial.

Around 11:30 p.m. on January 7, 1991, the victim was working as the shift manager at a Taco Bell in Dallas County. She was responsible for closing and cleaning the store and completing the appropriate paperwork. A co-employee, Travis Brown, was waiting inside the restaurant for the victim to finish her duties so that she could give him a ride home. Brown testified that appellant arrived at the restaurant by automobile with several other youths. Appellant and two

others then got out of the car and knocked on the door, claiming to need to use the telephone. Brown would not let the three enter the establishment because it was closed. He did, however, go to the back of the store and get the victim. The victim recognized the appellant as an ex-employee and allowed him to enter. Appellant then let his two colleagues into the restaurant.

Brown testified at trial that the victim then returned to the back of the store to finish some paperwork while appellant used the phone. After he hung up the phone, appellant came to the front of the restaurant and told Brown to leave because they were going to rob the Taco Bell. However, Brown professed that he could not leave. Appellant then went to the back office where the victim was working. Shortly after that, Brown heard some "yelling" and went to check it out. He found appellant "pistol-whipping" the victim while he had her in a headlock. After Brown attempted to get appellant to stop the attack, appellant stepped back and fired a shot at the victim.[1] Appellant then walked into the kitchen, grabbed a butcher knife, and returned to the office where he stabbed the victim three or four times. After this, all three perpetrators left the restaurant. Just before exiting, appellant told Brown that he would kill him if he talked to the police. However, after appellant left, Brown called the police.

Appellant alleges in his fifth point of error that the evidence is insufficient to support the jury's affirmative answer to the second special issue on future dangerousness. Article 37.071(b)(2), V.A.C.C.P. In reviewing whether the evidence is sufficient to support the jury's affirmative finding on the issue of future dangerousness, this Court must look at the evidence in the light most favorable to the verdict to

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[1] Brown clarified that he didn't think that appellant *shot* the victim, just that he shot at her. However, the medical examiner's testimony revealed that the victim was shot once in the back.

determine whether any rational trier of fact could have believed beyond a reasonable doubt that appellant would probably commit criminal acts of violence that would constitute a continuing threat to society. Jackson v. Virginia, 443 U.S. 307, 97 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Allridge v. State*, 850 S.W.2d 471 (Tex.Cr.App. 1991) (opinion on rehearing), *cert. denied*, U.S., 114 S.Ct. 101 (1993). This Court has set out a number of factors that may be considered in making this determination,[2] although the facts of the crime alone can be sufficient to support an affirmative finding to the special issue. *Allridge*, *supra*. In fact, the circumstances of the crime may provide greater probative evidence of a defendant's probability for committing future acts of violence than any other factor relevant to the second special issue. *Id.*

Looking at the evidence in the light most favorable to the verdict, we find the circumstances of the offense to be rather cruel. Appellant knew the victim and even hugged her when

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[2] See *Vuong v. State*, 830 S.W.2d 929 (Tex.Cr.App. 1992), *cert. denied*, U.S., 113 S.Ct. 595 (1992); *Keeton v. State*, 724 S.W.2d 58 (Tex. Cr.App. 1987) ("*Keeton I*"). These factors include, but are not limited to:

1. the circumstances of the capital offense, including the defendant's state of mind and whether he or she was working alone or with other parties;
2. the calculated nature of the defendant's acts;
3. the forethought and deliberateness exhibited by the crime's execution;
4. the existence of a prior criminal record, and the severity of the prior crimes;
5. the defendant's age and personal circumstances at the time of the offense;
6. whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;
7. psychiatric evidence; and
8. character evidence.

he came into the restaurant to use the phone. However, either in an attempt to get her to cooperate in opening the restaurant's safe or because of her inability to do so, he held her around the neck and hit her with the gun until part of it broke. He then shot her in the back. Apparently still not feeling finished with his handiwork, appellant went into the kitchen to get a butcher knife. On his return, he proceeded to stab the victim several times in the neck, chest, and thigh, including several wounds which were characterized by the State as "torture type wounds."

The manner in which the offense was committed illustrated some degree of forethought and deliberation on appellant's part. Furthermore, he appeared to be both the planner and the initiator of the crime. Some time before the actual incident, appellant evidently had formulated a plan to rob this Taco Bell because he "needed some money for court." Two of his companions heard him talking about the intended robbery over the phone, and appellant was later heard to ask the driver of the car if "he was going to do that for me" (apparently referring to the robbery considering all of the statements in context). After the driver replied "I guess so," the group proceeded to a house where appellant retrieved another person and was seen to have a gun in his hand. The group then proceeded to the Taco Bell. When they first arrived at the restaurant, appellant and two others got out of the car, but did not enter the restaurant. They got back into the car and began to drive away, but appellant encouraged the driver to turn around and go back.

Appellant was nineteen years old at the time of this offense, and he was shown to have one prior conviction for misdemeanor assault.[3] Appellant had also been stopped for

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[3] The evidence indicated that this conviction began as a felony aggravated assault. The facts show that appellant began seeing a girl whose boyfriend, Christopher Standmier, went off to college after agreeing to have an open relationship. However, when the girl started seeing appel-

the offense of "pedestrian in roadway," whereupon it was discovered that he had outstanding traffic warrants. During a search incident to appellant's arrest on these outstanding warrants, police discovered a baggie in appellant's underwear containing ten rocks of crack cocaine.[4]

While no psychiatric evidence was admitted, character evidence was presented by several high school teachers and other officials, family members, the family's reverend, and various others to which appellant gives us no citation to the record. One high school teacher testified that appellant had threatened to kill him and regularly spoke to him using profanities. However, the teacher also admitted that appellant was sometimes a docile student. One ex-principal testified that appellant had been suspended on two occasions and that appellant had a bad reputation for being a peaceful student who respected authority. Other school teachers and employees testified to the effect that appellant was no worse or made any more trouble than other students.

Looking at the totality of the evidence, we hold that a rational trier of fact could have believed beyond a reasonable doubt that appellant would probably commit criminal acts of violence that would constitute a continuing threat to society. *Jackson v. Virginia, supra; Allridge v. State, supra.* Point of error number five is overruled.

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lant, Standmier wrote her cruel letters and broke off the relationship. One day when Standmier was back in town, appellant saw him and began harassing him and a fight ensued. Appellant pulled a baseball bat from his car and struck Standmier in the ribs and broke the bat over his head. Then appellant ran back to his vehicle and pulled out a gun. Standmier backed down and appellant left.

Appellant was originally charged with aggravated assault, but the charges were reduced to a misdemeanor when Standmier got tired of taking off from school to come to court.

[4] The actual weight of the cocaine measured only one-fifteenth gram.

In point of error number one, appellant alleges that the trial court erred in submitting an instruction on the law of parties. He contends that a parties' charge was not raised by the evidence and, therefore, the trial court erred by including it in the jury charge. In *Brown v. State*, 716 S.W.2d 939, 946 (Tex.Cr.App. 1986), this Court held that "any error in charging on the law of parties is harmless if the evidence clearly supports appellant's guilt as a primary actor." *See also Black v. State*, 723 S.W.2d 674, 675 (Tex.Cr.App. 1986). Appellant recognizes this authority, but urges this Court to reexamine this body of law in light of *Black v. State*, 739 S.W.2d 638 (Tex.App. -Dallas 1987, no pet). This we decline to do.

By appellant's own concession, plus the recitation of the evidence set out above, the evidence clearly supports appellant's guilt as a primary actor. Therefore, if any error was committed by including the charge on the law of parties, then such error was harmless. *Brown*, 716 S.W.2d at 946. Point of error number one is overruled.

In his second point of error, appellant complains that the trial court erred in failing to instruct the jury that the witness Jerry Lewis was an accomplice as a matter of law. The question whether Jerry Lewis was an accomplice was presented to the jury as an issue of fact. In support of his contention, appellant refers to the following evidence.

Nickles Lewis testified that once they arrived at Taco Bell Jerry Lewis would occasionally get out of the car. Nickles also told the jury that Jerry Lewis eventually pulled the car up to the side of the restaurant, presumably to better see his companions inside. Appellant testified that Jerry disagreed with the parking place chosen by the driver, Kevin Shaw, and made instructive comments like "[t]hat's too far" and "[p]ark across the street." Also according to appellant, when the group arrived at Taco Bell, Jerry was one of the people who

ra over to see if the trash had been put out.[5] Appellant testified that, once he and two of his companions returned to the car, Jerry asked them "[w]hat's up?". Finally, appellant testified that when the group was fleeing from the restaurant appellant tried to hand the knife to Kevin Shaw, but Jerry Lewis told him to keep it in the back seat. Lastly, Dweilon Duncan testified that Jerry Lewis drove the car back to the Taco Bell after they had left the first time.

Contrary evidence was presented through Jerry Lewis' own testimony. Before the jury, Jerry Lewis denied any involvement in the offense. He specifically denied driving the car at any time and, in fact, told the jury that Kevin Shaw did all the driving. He also testified that Nickles Lewis was the one who instructed Kevin Shaw where to park. Jerry did admit to the jury that he got out of the car, but did so only because he was tired. He also testified that he told Shaw that he was ready to go because they should not be there. Finally, Jerry testified that, as they were driving away after the crime had been committed, appellant apparently threw the gun he had allegedly used into the front seat. And after the car was parked and everyone proceeded to go in separate directions, Jerry Lewis admitted in his testimony that he told Shaw to "[g]et the gun out of [his] grandmother's car."

In *Kunkle v. State*, 771 S.W.2d 435, 439 (Tex.Cr.App. 1986), *cert. denied*, 492 U.S. 925 (1989), this Court said:

> "An accomplice witness is someone who has participated with someone else before, during or after the commission of a crime.
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> * * *
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> "If the witness cannot be prosecuted for the offense with which the accused is charged, then the witness is not an

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[5] Apparently, the plan was to enter the restaurant when employee Travis Brown opened the door to put out the garbage.

accomplice witness as a matter of law. 5 Apparently, the plan was to enter the restaurant when employee Travis Brown opened the door to put out the garbage.

* * *

"[A] witness is not an accomplice witness merely because he or she knew of the offense and did not disclose it, or even concealed it. [Citations omitted.] The witness' presence at the scene of the crime does not render that witness an accomplice witness."

If there is a doubt whether the witness is an accomplice witness, then that may be submitted to the jury as a fact issue, even though the evidence seems to preponderate in favor of the fact that the witness is an accomplice witness as a matter of law. *Id.; See also Harris v. State*, 738 S.W.2d 207, 216 (Tex.Cr.App. 1986), *cert. denied*, 484 U.S. 872 (1987); *Ex parte Zepeda*, 819 S.W.2d 874 (Tex.Cr.App. 1991).

Given the evidence presented in the instant case, it is clear that there was a conflict as to the degree of participation, if any at all, that Jerry Lewis had in the crime. This being the situation, it was appropriate for the trial judge to present this question to the jury as an issue of fact. Point of error number two is overruled.

In point of error number three, appellant alleges that the trial court erred in failing to modify the special issue on deliberateness to reflect that only the conduct of appellant could be considered in answering that special issue. Specifically, appellant alleges that, while an "anti-parties" instruction was given, it was given only in the abstract. He contends that the first special issue itself should have been modified to specifically instruct the jury that the issue must be answered with reference to appellant's conduct alone.

The jury charge included the following instruction:

"You are further instructed that in answering the Special Issues in this charge relating to punishment, you must

> not consider the instructions given you in the guilt/ innocence phase of the trial that relate to the law of parties and the responsibility of parties for the acts of others in the commission of offenses. In this punishment phase of trial, you shall consider only the conduct of [appellant], and no other, in determining what his punishment shall be."

Even with this instruction, appellant alleges the jury would not understand the effect of the anti-parties charge on special issue number one[6] and would thus "answer this issue with reference to conduct not directly implicating [a]ppellant."

We disagree and hold that special issue number one and the "anti-parties" charge clearly focused the jury on appellant's own conduct. *Johnson v. State*, 853 S.W.2d 527, 536 (Tex. Cr.App. 1992), *cert. denied*, U.S., 114 S.Ct. 154 (1993). Point of error number three is overruled.

In point of error number four, appellant complains that the trial court erred in failing to instruct the jury on the law of self-defense as it pertained to an extraneous offense admitted against appellant at the punishment phase of trial. Appellant does not complain that a limiting instruction was not given,[7]

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[6] Special issue number one read as follows:

> "Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, [the appellant], that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?"

[7] A limiting instruction was, in fact, included in the charge. It read:

> "You are instructed that certain evidence has been admitted before you of criminal conduct and/or bad acts committed by the Defendant other than the offense for which he is on trial. In that regard, you are instructed that you may not consider such evidence for any purpose unless you first find and believe from the evidence beyond a reasonable doubt that the Defendant committed said criminal conduct or bad acts. If you do not so find or believe from the evidence, you must wholly disregard such evidence. You may consider

nor does he complain that he was prohibited from putting on evidence of any defenses he may have had to any extraneous offenses. Rather, appellant contends that it is a violation of due process to allow a defendant to put on evidence of a defense to an extraneous offense and then deny him the right to a proper instruction explaining the legal effect of such a defense. This is an issue of first impression.

The evidence at trial showed that on the afternoon of January 8, 1990, witness Christopher Standmier was in the parking lot of his mother's apartment complex retrieving some personal items from the trunk of his car when two cars pulled up. From one of the vehicles, appellant yelled at Chris, "Hey, Chris, I'm supposed to be a bitch?".[8] Chris responded that he did not know what appellant was talking about. Appellant then exited the vehicle in which he had been riding. Apparently believing that a fight was about to ensue, Chris told appellant to "come on and get some of this." Appellant then retrieved a bat from inside the vehicle and hit Chris once in the ribs. He then broke the bat over Chris' head. While Chris was recovering from that blow, appellant ran to the car in which he had arrived, pulled out a gun, cocked it, and told Chris, ". . . [G]et back from me. I'll kill you." At this point, Chris raised his hands and said, "Hey, you got me, man." Appellant then left.

While the evidence disputed whether appellant ever actually displayed a firearm, it did not dispute appellant's use of a baseball bat or the fact that Chris never had anything more threatening out than his hands. Furthermore, while the evidence showed that Chris was ready for, and possibly even looking forward to, a fist fight with appellant, he (Chris)

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any defenses the Defendant might have to any offenses."

[8] Apparently, the altercation arose from the fact that Chris' ex-girlfriend was dating appellant. Also, Chris had written the girl some rather heated letters in order to get her to leave him (Chris) alone.

made no overt action towards such behavior other than his statement to "come on and get some of this."

Therefore, even assuming that appellant would have been entitled to a instruction on self-defense, given the facts in the present case, the evidence failed to raise the issue of self-defense.[9] Point of error number four is overruled.

Appellant complains in point of error six that Article 37.071, V.A.C.C.P., is unconstitutional in that it provides no effective vehicle for a jury to apply mitigating evidence.[10] Appellant seems to be complaining that the stated provision is unconstitutional as applied in this case under *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

The trial court submitted the following instruction:

> "You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating

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[9] This Court stated in *Martinez v. State*, 775 S.W.2d 645, 647 (Tex.Cr. App. 1989):

> "Where a defensive theory is raised by the evidence, the trial court, upon proper request, must instruct the jury on the defensive theory without regard to whether such evidence was strong or weak, uncontradicted or impeached. [Citation omitted.] Integral to a determination of whether the evidence raised self-defense . . ., we look to whether [appellant] reasonably believed the use of [such] force was immediately necessary and whether [appellant's] assessment of the situation reasonably indicated he could have retreated."

See V.T.C.A., Penal Code, Section 9.31. It is clear that a reasonable person in appellant's situation would have retreated or, at a minimum, used a lesser amount of force than that which appellant actually employed.

[10] Appellant makes rather vague references to some general facts in his statement of facts at the beginning of the brief. However, he does not refer to these facts in his argument on this point. Nor does appellant point out where in the record we can find the majority of these vague references. (The facts we can find are: that appellant "had problems with his father"; that he was sometimes a "docile" student; that he seemed "sincerely remorseful"; and that he had an IQ of 78.)

evidence is evidence that reduces the Defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.

"In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are 'Yes,' and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues 'No' in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

"You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of

> you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve."

This instruction complied with *Penry* and provided a sufficient vehicle for the jury to consider any mitigating evidence appellant offered. See *Fuller v. State*, 829 S.W.2d 191, 209 (1992). Point of error number six is overruled.

In his seventh point of error, appellant claims the trial court erred in overruling his motion for a new trial based on a violation of the pretrial discovery order. Specifically, appellant claims that the section of the order requiring "[a]ll known convictions, pending charges or *suspected criminal offenses* concerning any *accomplice* proposed to be used as a witness by the State[,]" (emphasis added) was violated by the State's failure to disclose the "arrests and possible pending charges" of witnesses Dweilon Duncan and Nickles Lewis for an extraneous burglary of a habitation.[11] Appellant argues that this information should have been disclosed to him pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 316 (1964), and *Butler v. State*, 736 S.W.2d 668, 670 (Tex.Cr.App. 1987).

In regard to the State's failure to reveal the arrest of Dweilon Duncan, appellant has provided this Court with some facts surrounding the arrest, but provided no argument concerning the effect this evidence may have had on the outcome of the trial. Having presented us with nothing to review, we will not consider this point as to Duncan. Tex.R.App.Proc. 74. However, in regard to the arrest of Lewis, appellant states that witness Lewis was on felony probation and the arrest for burglary could have been used to

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[11] The burglary and the arrests occurred after the instant offense was committed, but before the capital murder trial commenced.

revoke that probation. Thus, appellant alleges, Lewis had an incentive to falsify his testimony.[12]

In *United States v. Bagley*, 473 U.S. 667, 674, 105 S.Ct. 3375, 3379, 87 L.Ed.2d 481 (1985), the United States Supreme Court explained that:

> ". . . [t]he holding in *Brady v. Maryland* requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or to punishment.' [Citations omitted.]
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> * * *
>
> "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.
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> * * *
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> ". . . unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose. . . ."

The *Bagley* Court also stated that impeachment evidence as well as exculpatory evidence falls within the *Brady* rule, for such evidence is "evidence favorable to an accused, . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal."

The potential constitutional error in *Bagley* did not involve any direct restriction on the scope of cross-examination as in Davis v. Alaska.[13] Rather, any error that may have existed

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[12] Appellant fails to mention, however, that Lewis' arrest for his involvement in the pending capital murder could have provided this same incentive.

[13] In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347

was the government's "failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination." *Bagley*, *supra*. Such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. *Id.* The conviction must be reversed only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial. *Id.*

The *Bagley* Court held that the standard of materiality applicable to the nondisclosed evidence is that set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court deemed this standard sufficiently flexible to cover cases of prosecutorial failure to disclose evidence favorable to the accused whether there has been no request for the evidence, a general request only, or a specific request. *Bagley*, *supra*. This standard is that:

> "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

(1974), the defense sought to cross-examine a crucial prosecution witness concerning his probationary status as a juvenile delinquent. By this cross-examination, the defense intended to show that the witness might have made a faulty identification of the defendant in order to shift suspicion away from himself or because he feared that his probationary status would be jeopardized if he did not satisfactorily assist the police and prosecutor in obtaining a conviction. Pursuant to a state rule of procedure and a state statute making juvenile adjudications inadmissible, the trial judge prohibited the defense from conducting the cross-examination.

The United States Supreme Court reversed the defendant's conviction, ruling that the direct restriction on the scope of cross-examination denied the defendant "the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" See *Bagley*, *supra*.

This standard was adopted by our Court in Ex parte Adams, 768 S.W.2d 281, 289-90 (Tex.Cr.App. 1989).

As in *Bagley*, the error, if any, in the present case does not involve any direct restriction on the scope of cross-examination. Rather, it involves the government's "failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination"; (that is, by failing to provide information that might have been used to impeach a government witness]. Looking at the totality of the circumstances, we cannot conclude that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Appellant maintains that Lewis was on felony probation and the arrest for burglary could have been used to revoke that probation, therefore, Lewis had an incentive to falsify his testimony. What appellant fails to mention, however, is that the same incentive might have arisen from Lewis' involvement in the instant case. Furthermore, appellant fails to mention that the victim of the burglary knew Lewis and, because some restitution was apparently paid or other arrangements made, the complainant chose not to press charges and the case was closed by the investigating officer before the trial in the instant case commenced. Nonetheless, appellant was not restricted on his cross-examination of this witness from asking questions about possible deals or inducements made in return for his testimony. Thus, we conclude that, had appellant had the information about the burglary arrest during the trial, there is no reasonable probability that the result of the proceeding would have been different. Point of error number seven is overruled.

Appellant raises both a *Batson*[14] challenge and a challenge to Article 35.261, V.A.C.C.P., in point of error number eight.

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[14] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

He complains that the trial court erred in overruling his objection to a peremptory challenge exercised against minority venireperson, Naomi Turner.[15]

To be entitled to a *Batson* hearing after objection, a defendant must first make a prima facie showing of purposeful discrimination on the part of the State. Once such a showing is made, then the burden shifts to the State to give race-neutral reasons for his exercise of a peremptory strike. After race-neutral reasons are supplied, then the defendant bears the burden of rebutting the explanation proffered by the State. *Batson*, supra. While we can find no place in the record where appellant actually objected to the strike used by the State or moved for a dismissal of the array, we will address the merits of this point as both parties do in their briefs.[16]

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[15] Appellant mentions that on appeal he also assigns error to the striking of venireperson John Smith. However, he does not argue this point in relation to Smith and, therefore, we will not address it. *See* Tex.R. App. Proc. 74.

[16] While appellant filed a pretrial Motion to Restrict *Use* of Peremptory Challenges, he does not seem to have otherwise objected at trial to the striking of veniremember Naomi Turner. The only attempts at preservation we found consisted of the following occurrences. First, after venire member Naomi Turner was questioned by both parties, the trial court excused her from the courtroom. The State exercised a peremptory strike and the trial court, without prompting from appellant, stated:

> "To save time, why don't we go ahead and have a Batson hearing now so we'll know whether we have to start jury selection all over again."

At that time, the State gave several reasons for striking Turner and appellant was allowed to cross-examine. The trial court then stated that it was withholding making a ruling until the end of jury selection. Appellant requested that the veniremember be placed on the jury at this time and the trial court denied the request.

Secondly, after all of the prospective jurors had been questioned, the trial court offered appellant an extra strike for the remaining juror to be seated. Before he made a decision on whether to accept the extra strike,

In *Vargas v. State*, 838 S.W.2d 552 (Tex.Cr.App. 1992), we adopted, for appellate purposes, the "clear error standard of review" as explained by the United States Supreme Court in *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). In applying this standard, we must determine whether the trial judge's decision is supported by the record so that it is not clearly erroneous. *Vargas*, supra; *Emerson v. State*, 820 S.W.2d 802 (Tex.Cr.App. 1993). This includes a review of the voir dire, the racial makeup of the venire, the prosecutor's neutral explanations, and appellant's rebuttal and impeaching evidence. *Id.*

In the instant case, the prosecutor gave several reasons for peremptorily striking the veniremember including:

1. She made statements about police officers that the younger ones were very arrogant and could be disrespectful in the South Dallas area.

2. She cited at least three incidents where she felt the police had acted inappropriately—one where her brother was arrested, one where she was hit by another driver, and a third where she said a police officer was being rude to her.

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appellant requested that Naomi Turner be seated as the twelfth juror—a request which the trial court again denied. Appellant then stated that:

> "[I]t is my understanding that. . . we would still be entitled to have a *Batson* hearing in which if the Court is so convinced [that the veniremember was struck for racial reasons] then the whole panel would then be flushed."

Presumably appellant was referring to the quashing of the entire panel which is the only remedy available under Article 35.261, V.A.C.C.P.

While neither occurrence technically suffices to preserve this point of error, we will address the merits since neither party argues that the point was not preserved and both argue the merits. See generally, *Williams v. State*, 773 S.W.2d 525, 533-34 (Tex.Cr.App. 1988), *cert. denied*, 493 U.S. 900 (1989).

3. She indicated that her brother was on probation for some assaultive offense against his wife. However, she never appeared to have any interest in finding out the details because "she was not the one to pass judgment."
4. She indicated that she had a nephew in the penitentiary who was near the defendant's age. But, again, she didn't know for what he was incarcerated.
5. Finally, she indicated in regard to the second punishment issue that she would want to be shown a prior record or something more than just the facts of the case.

The prosecutor testified that his decision to strike Turner was based on the totality of the above-stated reasons and not on any one particular answer. After the State finished, appellant was given the opportunity to question the prosecutor and was able to elicit the facts that the State had not questioned the veniremember as to specific names of officers or whether she even remembered any names. Appellant was also able to explore the potentially disparate treatment of other non-minority veniremembers who appeared to have "problems" with police officers or had relatives in jail for unknown crimes but were not peremptorily struck by the State. In his appellate brief, appellant also brought out the fact that the State struck seven minority persons in all, and two blacks served on the jury. Also, he again relied heavily on the fact that other veniremembers whom the State found acceptable possessed some of the same characteristics that the prosecutor claimed to have caused him to excuse venireperson Turner. The trial court then withheld its ruling until the end of jury selection, but eventually allowed the peremptory to stand.

We stated in *Cantu v. State*, 842 S.W.2d 667 (Tex.Cr.App. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 3046 (1993) that:

> "'Disparate treatment,' as such, cannot automatically be imputed in every situation where one of the .State's

reasons for striking a venireperson would technically apply to another venireperson whom the State found acceptable. [Citations omitted.] The decision to strike a particular venireperson is not susceptible to rigid quantification; rather, it is a fluid process, often hinging on the interaction of a number of variables and permutations. [Citation omitted.] For example, it is unlikely that two venirepersons on one panel will possess the same objectionable attribute or character trait in precisely the same degree. Such qualitative distinctions may cause a prosecutor to challenge one venireperson and not the other. [Citations omitted.]

"Thus, when the State has offered more than one plausible reason for striking a venireperson, it is proper to review these reasons in their entirety in order to assess whether the State's explanation was valid or merely pretextual. Where, as here, the State has offered numerous race neutral reasons for its challenge, we cannot say that the fact that there were other acceptable jurors possessing one or more of these objectionable attributes, is sufficient to establish disparate treatment."

This statement applies just as readily to the present case. As the United States Supreme Court stated in *Hernandez*, supra, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Thus, looking at the entirety of the record and giving deference to the trial judge, who was present to assess the credibility of the prosecutor and his explanations[17], we hold in the instant case that the decision of the trial court was not clearly erroneous. Point of error number eight is overruled.

Finding no reversible error, we affirm the conviction and sentence of the trial court.

McCormick, Presiding Judge

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[17] See *Cantu*, supra.

(Delivered June 22, 1994)
En Banc
Do Not Publish

Miller, J., concurs in the result
Clinton, J., dissents

XVII.

REPLY TO APPLICANT'S GROUND FOR RELIEF SEVENTEEN

This ground for relief is procedurally barred because the identical claim was both raised and decided on the merits on direct appeal. In the alternative, the mitigation instruction submitted to the jury was approved by the Texas Court of Criminal Appeals and is constitutionally sufficient.

Applicant claims that his death sentence is violative of both the Eighth and Fourteenth Amendments to the federal constitution because the jury instructions failed to supply "an adequate vehicle for the jury to give effect to Applicant's mitigating evidence" in accordance with the United States Supreme Court opinion in *Peng v. Lynaugh*, 492 U.S. 302 (1989). U. S. CONST. amends. VIII, XIV; Applicant's Writ at 190. This claim is procedurally barred as it was both raised and decided on the merits on direct appeal. Alternatively, the record affirmatively reflects that Applicant received an instruction on mitigation which was approved by the Texas Court of Criminal Appeals and was sufficient to meet the dictates of *Penry*.

Procedural Bar

Applicant concedes that he raised this identical complaint on direct appeal and that the Court of Criminal Appeals overruled his claim on the merits. Applicant's Writ at 196; *see also* Applicant's Writ Exhibit 15, (Point of Error 6); *Smith v. State*, No. 71,333 at 10-11 (Tex. Crim. App. June 24, 1994) (unpublished). Issues which have been raised and rejected on direct appeal provide no basis for habeas relief and are procedurally barred. *See Ex parte Ramos*, 977 S.W.2d at 617 (holding that a claim which was raised and rejected on direct appeal is generally not cognizable in a writ of habeas corpus);

Ex parte Acosta, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984) (same); *see also Ex Parte Schuessler*, 846 S.W.2d 850, 852 n. 6 (Tex. Crim. App. 1993). The only exception to this procedural bar occurs in rare situations where a direct appeal cannot be expected to provide an adequate record to evaluate the claim in question, and the claim might be substantiated through additional evidence gathered in a habeas corpus proceeding. *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). For example, in most instances, the record on direct appeal is inadequate to develop an ineffective assistance of counsel claim and the more appropriate vehicle for fully developing this claim is a writ of habeas corpus. *Id.* Other examples include situations where the prior judgment of the Court of Criminal Appeals is subsequently rendered void or where the Court has decided to apply relief retroactively after a subsequent change in the law. *Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994). The case at bar, however, does not present an exception to the general rule.

Applicant has already raised this identical issue regarding the "*Penny*" charge on direct appeal. This identical argument was rejected by the Court of Criminal Appeals. *Smith v. State*, No. 71,333 at 10-1.1 (Tex. Crim. App. June 24, 1994) (unpublished). Applicant has failed to provide any new or different allegations that would warrant re-consideration of these claims. Nor does Applicant argue that there has been a subsequent change in the law so as to render the judgment void or mandate a retroactive application of a new rule of law. Therefore, Applicant's request for habeas relief should be denied.

Applicant's Claim is Without Merit

Assuming, *arguendo*, that this issue is deemed to be properly presented, the State contends that relief should be denied on the merits. The appellate record affirmatively reflects that Applicant received an instruction authorizing the jury to show

mercy if the mitigating evidence warranted a penalty less than death. (CR:114-115). That instruction is as follows:

> You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.
>
> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the special issues are "Yes," and you believe from the mitigating evidence, if any, that the defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

> You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve.

(CR:114-115). On direct appeal, the Court of Criminal Appeals specially held that this charge complied with *Penry*, and provided a sufficient vehicle for the jury to consider any mitigating evidence offered by Applicant. *Smith v. State*, No. 71,333 at 10-11 (Tex. Crim. App. June 24, 1994) (unpublished).

Similar instructions have been held constitutional by the Court of Criminal Appeals in a plethora of other cases. *See, for example, Robertson v. State*, 871 S.W.2d 701, 710 (Tex. Crim. App. 1993), *cert. denied*, 513 U.S. 853 (1994) (holding that a separate "special issue" on mitigation is not required under *Penry* and that a "nullification" charge is sufficient to meet the commands of Penry); *Fuller v. State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992), *cert. denied*, 508 U.S. 941 (1993) (holding that a nullification charge "was adequate to avoid the constitutional infirmity condemned by *Penry* because we do not perceive 'a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevented] the consideration of constitutionally relevant evidence," citing to and relying on *Boyde v. California*, 494 U.S. 370 (1990)). *See also Mason v. State*, 905 S.W.2d 570, 576 (Tex. Crim. App. 1995); *Coleman v. State*, 881 S.W.2d 344, 356 (Tex. Crim. App. 1994); *Coble v. State*, 871 S.W.2d 192, 206-207 (Tex. Crim. App. 1993), *cert. denied*, 513 U.S. 829 (1994); *San Miguel v. State*, 864 S.W.2d 493, 495 (Tex. Crim. App. 1993). Additionally, the Court has not limited instructions for *Penry* purposes to only this form of instruction. Rather, the Court has found instructions other than a "jury nullification" charge to also be sufficient for *Penry*

purposes. *See, for example, State v. McPherson*, 851 S.W.2d 846, 847-50 (Tex. Crim. App. 1992), *cert. denied*, 508 U.S. 939 (1993) (holding that the submission of a fourth punishment issue provided the jury a "means of considering and giving effect to mitigating evidence," was an appropriate response to *Penry*).

It is important to note that, in its *Penry* opinion, the Supreme Court failed to specify what particular vehicle was required under the Eighth Amendment "for the jury to give mitigating effect to" a defendant's mitigating evidence which falls beyond the scope of the statutory punishment issues. *Penry*, 492 U.S. at 324-328. While it is true that the Texas Legislature later codified *Penry* in 1991 amendments to the Texas statutory death penalty scheme, *see* Tex.S.B. 880, Sec. 5, 72nd Leg., R.S. (1991) V.T.S.L.S. Chapter 838, that fact alone does not mandate a repudiation of cases in which a defendant received a "jury nullification" charge or other form of instruction in an effort to guide the jury's discretion on the appropriate effect of mitigating evidence.

Furthermore, Applicant's mitigating evidence was not truly "*Penry*" type evidence. Some of the evidence relied on by Applicant shows only poor family history, which does not necessitate a *Penry* instruction. *Trevino v. State*, 815 S.W.2d 592, 622 (Tex. Crim. App. 1991), *remanded on other grounds*, 503 U.S. 562 (1992) (holding that evidence of a turbulent family history does not necessitate a special *Penry* instruction). Other evidence was merely "good character" evidence offered by friends and family members. Likewise, this is not *Penry* evidence. *See Norris v. State*, 902 S.W.2d 428, 448 (Tex. Crim. App. 1995); *Muniz v. State*, 851 S.W.2d 238, 256 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 837 (1993). The nature of the evidence does not mandate a mitigating instruction.

Conclusion

Because this issue was raised and addressed on the merits on direct appeal, Applicant is procedurally barred from having this issue considered on habeas. Additionally, assuming the evidence merited an instruction on mitigation, the appellate record reflects that Applicant received an appropriate instruction authorizing the jury to consider mitigating evidence and to show mercy if the jury concluded that the weight of that evidence demanded it. Applicant's seventeenth ground for relief should be denied.

State's Brief on Submission to the
Texas Court of Criminal Appeals

Oral Argument Requested

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS
AT AUSTIN

No. 74, 228

EX PARTE

LAROYCE LATHAIR SMITH

On application for Writ of Habeas Corpus
From the 265th Judicial District Court
Dallas County, Texas
Cause No. W91-22803-R

STATE'S BRIEF

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The State of Texas submits this brief to the Honorable Court of Criminal Appeals in reply to the brief and supplemental brief of applicant. LaRoyce Lathair Smith.

STATEMENT OF THE CASE

Applicant filed a state application for writ of habeas corpus seeking relief from his capital murder conviction and death sentence. The trial court issued findings of fact and conclusions of law, recommending the denial of relief. This Court ordered the application filed and set for submission on applicant's seventeenth allegation of error.

STATEMENT OF FACTS

Applicant and his companions robbed the employees of the Taco Bell restaurant where applicant once worked, and during that robbery, applicant pistol whipped, shot, and stabbed to death his former co-worker, Jennifer Soto.

SUMMARY OF ARGUMENT

Applicant proffered no evidence that warranted a supplemental mitigation instruction. And assuming one was necessary the supplemental instruction applicant's jury received was constitutionally sound

ARGUMENT

In his seventeenth ground for relief, applicant contends the trial court's punishment charge violated his Eighth and Fourteenth Amendment rights under the federal Constitution because (1) it did not provide the jury with a vehicle by which it could consider and give mitigating effect to evidence of his "limited mental capacity" and "difficult family background." and (2) it interfered with the jury's consideration of all relevant mitigating evidence offered by applicant. Applicant predicates his contention primarily on the U.S. Supreme Court's recent opinion in *Penry v Johnson*, 532 U.S. 782. 121 S.Ct. 1910. 150 L.Ed.2d 9 (2001) (*Penry II*). In particular, applicant likens the instruction his jury received regarding

mitigating evidence to the instruction held constitutionally deficient in *Penry II.*

Unlike Penry, however, applicant proffered no evidence that warranted a supplemental mitigation instruction. And assuming one was necessary, the supplemental instruction applicant's jury received was constitutionally sound.

Supplemental Mitigation Instruction Unnecessary

Not all mitigating evidence warrants a supplemental instruction. *See Graham v. Collins*, 506 U.S. 461, 476-77 (1993) (mete fact that mitigating evidence could be viewed as having *"same* arguable relevance beyond the special issues" does not entitle defendant to supplemental mitigation instruction) (citing *Franklin v. Lynaugh*, 487 U.S. 164, 180 n.10 (1988)). Only constitutionally relevant mitigating evidence that cannot be given effect by the special issues requires one. *Boyd v. Johnson*, 167 F.3d 907, 911 (5th Cir. 1999), *cert. denied*, 527 U.S. 1055 (1999) (citing *Davis v. Scott*, 51 F.3d 457, 460 (5th Cir. 1995). *cert. denied*, 516 U.S. 992 (1995)).

The Supreme Court found Penry's mental retardation and severe childhood abuse constitutionally relevant to the jury's punishment determination because they diminished his ability "to control his impulses or to evaluate the consequ4nces of his conduct," and, thus, reduced his moral culpability. *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) (*Penry I*): *see also Graham*, 506 U.S. at 473. But Penry's retardation and abuse constituted a "uniquely severe permanent handicap" with which he was burdened through no fault of his own. *Boyd*, 167 F.3d at 911-12 (citing *Davis*, 51 F.3d at 460). Furthermore. Perin: attributed his crime to that handicap. *Penry I*, 492 U.S. at 308-09.[1]

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[1] "In Dr. Garcia's judgment. *Penry* was suffering from an organic brain disorder at the time *of the offense* which made it impossible for him to appreciate the wrongfulness of his conduct or *to* conform his conduct to the law." (emphasis added)

Even assuming applicant's mental limitations and troubled family life were handicaps, they were neither unique nor severe; nor was his crime attributable to them. Thus, they were irrelevant to his moral culpability and warranted no supplemental instruction.

(1) No Evidence of a "Uniquely Severe Permannt Handicap"

As evidence of his mental limitations, applicant cites testimony and school records indicating his behavior was "exemplary," but that he was a "stow learner" with an I.Q. of seventy-eight and learning disabilities that were possibly organic in origin.[2] Psychological counseling was recommended, and applicant attended special education classes until the eighth grade: nevertheless, he failed a state slips test and dropped out of school in the ninth grade at the age of eighteen.[3] (RR28: 120-30: RR29: 28, 34: RR32: 14-42. 125: Defense Exhibits 38-55).

These facts evince no uniquely severe handicap. Applicant's I.Q. is not indicative of retardation: it is above that of even mildly retarded persons. *See Ex parte Tennard*, 900 S.W.2d *57*.60-61 (Tex. Crim. App. 1997). *cert. denied*, 524 U.S. 956 (1998) (noting classification as "mentally retarded" under AAMR standards generally requires I.Q. of seventy or below). An applicant's I.Q. and learning disabilities do not, in and of themselves, indicate an inability to control his impulses or evaluate the consequences of his conduct *See Madden v. Collins*, 18 F.3d 304. 308 (5th Cir. 1994), *cert. denied*, 513 U.S. 1156 (1995) (although defendant's learning

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[2] A school psychologist opined that applicant's-mother's gestation diabetes and the seizures she suffered during applicant's birth could be the organic cause of applicant's learning problems. (RR32: 27-28: Defense Exhibit 43).

[3] This testimony came from applicant, his mother, and Alberta Pingle, a DISD employee who related the contents of the school records.

disability could be defined as an organic brain impairment, it was not so uniquely severe that it give rise to a *Penry I* claim). In fact, applicant's normally "exemplary" behavior, notwithstanding these deficiencies, indicates the opposite. (RR32: 41-42; Defense Exhibit 52).

Furthermore, applicant fails to relate his background evidence to any handicap, severe or otherwise. He cites testimony of the emotional and financial hardships engendered by his father's drug use, criminal history, mistreatment, and abandonment. (RR28: 126, 134-145; RR29: 38-40; RR32: 11, 89-93). But applicant does not demonstrate how any hardship affected his ability to control or evaluate his conduct. *See Madden*, 18 F.3d at 308 (defendant's troubled childhood. including possible abuse, not constitutionally relevant mitigating evidence where no showing it had any psychological effect on him); *Barnard v. Collins*, 958 P.2d 634, 638-39 (5th Cir. 1992), *cert. denied*, 510 U.S. 1102 (1994) (defendant's childhood experiences did not support Penry claim give absence of any evidence that those experiences led to any mental impairment or psychological problem to which crime could be attributed). Absent evidence of any psychological impact, applicant's familial hardships fall well short of the "handicaps" evidence contemplated by *Penry I*.

(2) No Nexus Between Applicant's Evidence and His Crime

In addition, unlike Penry's retardation and abuse, applicant's mental limitations and troubled family background had no connection to his crime. A defendants disadvantaged background or emotional and mental problems bear on his moral culpability only if his crime can be attributed to them. *See Penry I*, 492 U.S. at 319 (citing *California v. Brown*, 479 U.S. 538, 545 (1987)); *Boyd*, 167 F.3d at 912. Thus, absent some link to his crime, applicant's evidence of background and mental limitations was irrelevant to his moral culpability

and, thus, the jury's punishment determination. *See Boyd*, 167 F.3d at 912 (defendant's low IQ was irrelevant mitigating evidence given absence of any showing that defendant's crime attributable to that fact); *Madden*, 18 P.3d at 308 (defendant's troubled childhood, including possible abuse, constitutionally irrelevant absent evidence that abuse had some psychological effect on defendant that led to his crime).

Applicant neither claims nor demonstrates any link between his background or mental limitations and his crime. He maintains, instead, that the law no longer requires such a nexus. He infers this from the Supreme Court's order vacating and remanding *Robertson* v. *Johnson*, 234 F.3d 890 (5th Cir. 2000) in light of *Penry II*. In addition, he argues that the Fifth Circuit disavowed a nexus requirement *Dowthitt v. Johnson*, 230 F.3d 733 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1250 (2001). Applicant is wrong on both counts.

As of yet, no court has determined whether Robertson was entitled to a supplemental instruction in the first place. The Fifth Circuit originally denied certificate of appealability (COA) in *Robertson* based solely on the conclusion that the supplemental instruction given satisfied the dictates of *Penry I*. *Robertson*, 234 F.3d at 899. Consequently, the fact that the Supreme Court vacated and remanded *Robertson* or that the Fifth Circuit has since granted COA says nothing new about what kind of evidence requires a supplemental instruction. *See Robertson* v. *Cockrell*, No. 10512, 2002 U.S. App. LEXIS 729, at *2 (5th Cir. Jan. 17, 2002).[4]

And contrary to applicant's assertion, the Fifth Circuit did not disavow a nexus requirement. Applicant relies upon a footnote in *Dowthitt* quoting *Williams v. Taylor*. 529 U.S. 362

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[4] The Attorney General filed a motion for rehearing in *Robertson* on January 30, 2002. As of the date the State filed this brief, the motion is still pending before the Fifth Circuit.

(2000).[5] Applicant misinterprets that quote. When read in context, it is readily apparent that the quote is merely a re-statement of *Penry I,* i.e., that some mitigating evidence may have relevance outside of the special issues. Furthermore, the Fifth Circuit recently employed the nexus requirement in *Hernandez v. Johnson*, 248 F.3d 344,349 (5th Cir.), *cert. denied*, 122 S.Ct. 621 (2001), dismissing any suggestion that the court *has* disavowed the requirement.

In sum, because applicant presented no evidence of a uniquely severe handicap to which his crime could be attributed, he had no right to a supplemental instruction under *Penry I.* Thus, applicant fails to meet his burden of proving facts that would entitle him to habeas corpus relief. *Ex parte Maldonado*, 688 S.W.2d 414. 116 (Tex. Crim. App. 1985) (in a post-conviction collateral attack, burden is on applicant to allege arid prove facts which, if true, entitle him to relief).

(3) Mitigating Effect Possible Through Special Issues

Furthermore, its irrelevance notwithstanding, any mitigating quality that applicant's mental limitation and background evidence did have was not placed beyond the jury's effective reach. The jury could have given mitigating effect to that evidence by its answers to the deliberateness and future dangerousness special issues.

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[5] The *Dowthitt* footnote reads:

> We pause briefly to address the parties' arguments regarding the "nexus" requirement for a mitigation defense. So far as the State *is* asserting that mitigating evidence "not connected to the crime or future dangerousness" cannot be considered, it is not consistent with the Supreme Court's most recent statement on this issue: "Mitigating evidence unrelated to dangerousness alter the Jury's selection of penalty even if it does not undermine or rebut the prosecution's death-eligibility case." *(Terry) Williams* v. *Taylor*, 529 U.S. 362. 120 S.Ct. 1495, 1516, 146 L.Ed.2d 389 (2000).

Dowthitt, 230 F.3d at 759 n.15.

Applicant's IQ and learning difficulties were relevant to the question of whether he was capable of acting "deliberately." *Penry, I,* 492 U.S. at 322. The jury could have concluded that applicant could not carefully or thoroughly consider his conduct during the robbery and murder. Based on such a conclusion, the jury could have answered the deliberateness special issue "No." *See Tennard*, 960 S.W.2d at 62 (evidence of defendant's low IQ not beyond jury's effective reach because could have been used to answer deliberateness special issue "No").

In addition, the jury could have given mitigating effect both to applicant's mental limitations and his troubled family background in its determination of his future dangerousness. There was no evidence that applicant was unable to learn from his mistakes as a result of his hardships or learning disabilities. Indeed, the evidence showed that notwithstanding the difficulties he faced, applicant's behavior was usually exemplary." (RR32: 41-42; Defense Exhibit 52-55). Thus, the jury could have concluded, as the defense argued in closing, that applicant's conduct could be controlled in the structured environment of prison. (RR33: 53). Based on such a conclusion, the jury could have answered the future dangerousness issue "No.1." *See Graham*, 506 U.S. at 475-76 (jury could have concluded from evidence of defendant's background and character that crime was an aberration and defendant would pose no future danger); *Davis*, 51 F.3d at 454 (evidence of mental instability did not compel negative answer to future dangerousness special issue where no evidence defendant unable to learn from mistakes and other evidence demonstrated defendant responded positively to structured environment).

Applicant's Supplemental Mitigation Instruction
Satisfied *Penry I*

If, however, applicant's jury needed a vehicle other than the special issues for giving effect to some relevant mitigating

evidence, the supplemental instruction they received provided them one. Applicant summarily assets that the supplemental instruction in his case was "virtually" and "materially" identical to that given in *Penry II*. But the instructions are similar only to the extent that they both define and discuss mitigating evidence generally.

The *Penry II* instruction did not incorporate the abstract instructions defining mitigating evidence into any of the verdict form's special issues. It simply told the jury to "give effect and consideration to [mitigating circumstances] in assessing the defendant's personal culpability at the time you answer the special issue" by making negative finding to one of the special issues. *Penry II*, 121 S.Ct. at 1917.

This instruction did not notify the jurors they might encounter mitigating evidence that bore no relation to the special issues: nor did it tell them what to do with it if they did. Thus, on its face, the *Penry II* instruction did not provide the jury with a mechanism for giving effect to mitigating evidence it found irrelevant to the special issues. The only way a jury could vote for life based on such evidence would be to answer a special issue untruthfully, an act the charge did not, on its face, authorize. In essence, the charge put the jury in the untenable position of having to follow one instruction (the deliberateness or future dangerousness special issues) over the other (the supplemental instruction) without any guidance for doing so. *Penry II*, 121 S.Ct. at 1022 ("jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a 'true verdict").

In contrast, applicant's instruction expressly notified the jury that it might hear mitigating evidence unrelated to the deliberateness and future dangerousness special issues:

> You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find

> such evidence is mitigating under these instructions, you shall consider it in the following instructions . . .

(CR: 114).

Furthermore, unlike the *Penry II* instruction, applicant's instruction not only told the jury to consider such evidence in answering the special issues, it told them how to answer the special issues so that they might give mitigating effect to it. In short, the instruction plainly and definitively told the jury to change one of their affirmative answers to the special issues to a negative answer:

> In answering the Special Issues submitted to you herein, if you believe the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes." and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you.

(CR: 115).

Thus, unlike the *Penry II* jury, applicant's jury did not have to read anything into the mitigation instruction or confront the dilemma of choosing one of the court's instructions over the other. Applicant's instruction expressly authorized the jury to change its answer to one of the special issues based on any mitigating evidence that, while bearing no relation to the special issues, nonetheless, warranted the imposition of a life sentence. Given this explicit instruction, the jurors did not have to violate their oath to follow the charge because, unlike the *Penry II* jurors, they knew that the mitigation instruction could "trump" the special issues.

In sum, applicant's instruction did what the *Penry II* instruction only purported to do. It authorized the jury to give effect to any *Penry I* evidence by nullifying its answer to one

of the special issues. In so doing, it did not violate applicant's constitutional rights: it ensured them.

The State recognizes that applicant's instruction is similar to the instruction held deficient in *Robertson. Robertson*, 234 F.3d at 894-95. Based on the distinctions discussed above, however, the State vehemently disagrees with the Fifth Circuit Court's conclusion in *Robertson* that there was "no substantial difference" between the *Robertson* and *Penry II* instruction. Furthermore, the State contends that *Robertson* is not persuasive authority. It provides no comparative analysis of the *Robertson* and *Penry II* instructions. And as previously noted, a motion for rehearing is currently pending in the case.

Lastly, it tests the bounds of reason to grant applicant relief based on a good-faith attempt to give him a supplemental instruction to which he was not constitutionally entitled. Given the absence of any *Penry I* evidence, the instruction applicant's jury received was, at worst, mere surplusage.

For all the foregoing reasons, this Court should find applicant's seventeenth allegation of error unfounded and deny his request for habeas corpus relief.

PRAYER

The State prays this Honorable Court will deny applicant's request for relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The State mailed a copy of this brief to applicant's attorneys: Jan Hemphill, 4519 West Lovers Lane, Dallas, Texas 75209-3171, and Craig A. Harris, Winstead Sechrest & Minick. P.C., 5400 Renaissance Tower, 1201 Elm Street, Dallas, Texas 75270-2199 on February 5, 2002.

/s/ Lisa Braxton/Smith
LISA BRAXTON/SMITH

Opinion on State Habeas, Texas Court of Criminal Appeals
Ex Parte LaRoyce Lathair Smith,
132 S.W. 3d 407 (Tex. Crim. App. 2004)

COURT OF CRIMINAL APPEALS OF TEXAS

No. 74228

Ex parte LAROYCE LATHAIR SMITH,
Applicant.

April 21, 2004

OPINION

COCHRAN, *J.*, delivered the opinion of the Court, joined by KELLER, *P.J.*, MEYERS, WOMACK and JOHNSON, *JJ.*

We deny habeas corpus relief in this case because there was no constitutional infirmity in applicant's capital-murder punishment-phase jury instructions. First, applicant's mitigation evidence was not *Penry I* evidence; therefore, the jury could give effect to this evidence within the scope of the two special issues. Second, we find no error in the trial court's supplementary nullification instruction. I.

In 1991, a Dallas County jury convicted applicant of capital murder for the robbery-murder of Jennifer Soto. During the punishment phase, applicant introduced evidence that he had a difficult family life as a child and that he was mentally slow, though not mentally retarded. Under the law in effect at the time of the trial, the jury was then given two special issues during the punishment phase: First, was the killing deliberate? And second, does the defendant pose a continuing danger to others? Because this trial took place during that

two-year hiatus between the Supreme Court's decision in *Penry I*[1] and the Texas Legislature's enactment of a new statutory special issue in response to *Penry I*,[2] the trial judge also gave the jury a non-statutory nullification instruction. That supplemental instruction read:

> You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.
>
> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evi-

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[1] *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (*Penry I*).

[2] *See Robertson v. Cockrell*, 325 F.3d 243, 249 (5th Cir.) (*en banc*) (noting that "dozens" of capital trials were conducted during this "hiatus" using an extra-statutory *Penry I* nullification instruction), *cert. denied*, 539 U.S. 979, 124 S.Ct. 28, 156 L.Ed.2d 691 (2003).

dence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve.

These supplemental instructions explicitly told the jury that:

1. It "shall" consider any and all mitigating evidence;

2. The mitigating evidence might, but need not, relate to the defendant's character, record, background, or any circumstances of the offense;

3. Mitigating evidence is any evidence which reduces the defendant's personal or moral culpability or blame worthiness;

4. Mitigating evidence need not have any relationship to either of the Special Issues;

5. The jurors need not be unanimous about what specific evidence each one considers mitigating;

6. The jurors each decide what evidence is mitigating and how much weight to give it;

7. If the jury finds, from the mitigating evidence, that the defendant should not be sentenced to death, then it

"shall" answer one of the Special Issues "No"; and

8. The State must prove, beyond a reasonable doubt, that the death penalty should be imposed despite the mitigating evidence.

Based upon the evidence admitted at trial and the trial judge's instructions, the jury found that the State carried its burden on the special issues[3] and proved, beyond a reasonable doubt, that a death sentence should be imposed despite applicant's mitigating evidence. Therefore, the trial judge sentenced applicant to death.

On direct appeal, applicant claimed that, under *Penry I*, Article 37.071 was unconstitutional as applied to him because the jury was unable to give effect to his mitigating evidence in answering the special issues. We rejected this claim and held that, regardless of whether applicant's mitigating evidence was beyond the scope of the two statutory special issues, the judge's extensive supplemental instruction provided a sufficient vehicle for the jury to consider all of applicant's mitigating evidence.[4]

Applicant filed an original writ of habeas corpus in the convicting court in 1998, but we dismissed that writ as untimely filed. After the Legislature revised Article 11.071, § 4A, to permit applicant to file a new writ, he timely filed

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[3] These special issues were:

(1) Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, LaRoyce Lathair Smith, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

(2) Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, LaRoyce Lathair Smith, would commit criminal acts of violence that would constitute a continuing threat to society?

[4] *Smith v. State*, No. 71,333 slip op. at 10-11 (Tex.Crim.App. June 22, 1994) (not designated for publication).

another writ and now claims that the trial judge's supplemental "nullification" instructions were unconstitutional under *Penry II*.[5] Applicant argues that his supplemental jury instructions were "virtually identical" to those given in *Penry II*, and his mitigation evidence was similar to that offered in *Penry II*. Therefore, he claims, he is entitled to relief under *Penry II*.

We disagree. First, the present supplemental instructions are similar to those given in *Penry II* only to the extent that both were "nullification" instructions. Otherwise, they are dissimilar in ways that render the present instruction constitutionally sufficient. Second, applicant's evidence of an unhappy childhood and as a slow learner is simply not the "two-edged sword" type of evidence contemplated in either *Penry I* or *Penry II*. Applicant might be entitled to relief only if the Supreme Court intended to hold, in *Penry II*, that all nullification instructions are constitutionally infirm in all cases in which the defendant offers any mitigation evidence. We do not read *Penry II* that broadly, and neither did the Fifth Circuit in its en banc decision in *Robertson v. Cockrell*.[6] If Robertson (whose mitigation "evidence-in quality and quantity-does not match Penry's")[7] was not entitled to relief under *Penry II*, then applicant, whose mitigation evidence does not rise to the level found in *Penry I*, is likewise not entitled to relief.

II.

A. *Penry I* mitigation evidence and the *Penry II* mitigation instruction issue.

In *Penry I*, the Supreme Court held that, although the Texas statutory special issues are a facially constitutional and

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[5] *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*).

[6] *Robertson*, 325 F.3d at 249-58.

[7] 325 F.3d at 244.

sufficient framework, those special issues may sometimes be insufficient to protect a defendant's right to have the jury consider and give effect to certain types of mitigating evidence.[8] Penry's mitigation evidence was that he had suffered severe childhood abuse and that he was mentally retarded. With evidence of this nature and severity, the special punishment issues might be insufficient in two ways.

First, Penry's evidence showed that, as a consequence of these two severe problems, he had a diminished ability "to control his impulses or to evaluate the consequences of his conduct."[9] The severity of Penry's impairment suggested a possible lack of full moral culpability, but the Supreme Court reasoned that, without a definition of "deliberateness" in the first special issue which would encompass a diminished moral culpability, the jury might not believe it could give full mitigating effect to this evidence.[10]

Second, the type of mitigation evidence offered by Penry was a "two-edged sword"; while it diminished his personal moral culpability, it increased the likelihood that he would constitute a continuing threat to society under the "future dangerousness" special issue.[11] Precisely the same evidence that made Penry potentially less morally aware and less culpable made him considerably more dangerous to others. The Supreme Court concluded that Penry had a constitutional right to jury instructions that would provide a vehicle for the jury to express its "reasoned moral response" to his double-edged mitigation evidence and to decline to impose the death penalty if it believed Penry's moral culpability was less because he had suffered from severe childhood abuse and mental retardation.[12] Because the bare-bones jury instruc-

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[8] *Penry I*, 492 U.S. at 315-37, 328, 109 S.Ct. 2934.
[9] *Id.* at 322.
[10] *Id.* at 323.
[11] *Id.* at 324.
[12] Id. at 328. FN 13. Id.

tions did not provide a sufficient vehicle for the jury, the Supreme Court reversed Penry's death sentence and remanded the case for a new punishment trial.[13]

The 1989 decision in *Penry I* created grave difficulties for Texas trial courts in capital murder cases. As the Fifth Circuit noted, trial courts:

> could not craft entirely new jury interrogatories, as the precise questions had been written by the state legislature. Nor could they suspend the trials in anticipation of legislative remediation, as the legislature would not meet again until 1991 and its reaction was unknown. Hoping to provide timely and Penry-compliant trials, the courts generally chose to cure the perceived deficiencies in the jury interrogatories by issuing, when appropriate, the supplemental instruction described above. This the Texas courts did from the pronouncement of *Penry I* to September 1, 1991, when the amended statute went into effect.[14]

Penry himself was retried during this legislative interregnum. And the trial judge gave the jury supplemental "nullification" instructions.[15] Once again, the Supreme Court reversed

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[13] *Id.*

[14] *Robertson*, 325 F.3d at 248-49.

[15] Those instructions were: You are instructed that when you deliberate on the question posed in the special issues, you may consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence,

Penry's death sentence, holding that the supplemental instructions still failed to give the jury an adequate vehicle by which they could consider and give effect to Penry's mitigation evidence of severe childhood abuse and mental retardation.[16] Furthermore, the Court held that the structure of the supplemental instruction, telling the jury to change its answer to one of the special-issue questions from a truthful "Yes" to an untruthful "No" simply to avoid imposing the death penalty, forced conscientious jurors to violate their oath to answer the questions truthfully.[17] Penry's death sentence was again reversed and the case returned for a third punishment trial.

Significantly, however, the Supreme Court did not state, in either *Penry I* or *Penry II*, that the Texas special-issue scheme was an insufficient vehicle for all mitigation evidence, or that all supplemental nullification instructions were necessarily unconstitutional vehicles for a jury's consideration of mitigating evidence.

B. The two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence.

The first question before this Court is whether the two special issues given in this case provided a sufficient vehicle for the jury to give effect to applicant's mitigating evidence of a troubled childhood and of his somewhat limited mental ability. Given the quantity and quality of that evidence, we conclude that they did.

First, applicant offered evidence of his limited mental capacity. Applicant's mother testified that applicant was "a slow learner" in school. He had an I.Q. of 78 and possible

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is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues. See *Penry II*, 532 U.S. at 790, 121 S.Ct. 1910.

[16] *Id.* at 797, 121 S.Ct. 1910.

[17] *Id.* at 798-801, 121 S.Ct. 1910.

organic learning disabilities. Applicant attended special-education classes and his behavior was often noted as "exemplary," but he dropped out of school in the ninth grade at the age of eighteen. He committed this capital murder at the age of nineteen. This is evidence of below-average educational abilities and attainment, but it does not reflect even mild mental retardation, nor does it qualify as a severe handicap.

Second, applicant offered evidence of his difficult family background. His father had been in prison for robbery, was involved with a motorcycle gang, consorted with other women, used alcohol and drugs, and stole from his own family. This situation upset applicant. Because the family did not have a lot of money, applicant began looking for work as a young teen-ager. According to defense witnesses, applicant suffered because of his father's thefts from the family and from a lack of money in the home. This evidence sets out a less-than-ideal family background. But, like Robertson, whose natural father was an abusive alcoholic, applicant does not—with his unfortunately not-atypical evidence of an adverse childhood—raise a *Penry* issue.[18] While it may be of some mitigating value, it is not a "severe" handicap under *Penry I*.

Penry I does not require a special mitigation instruction, apart from the two statutory special issues, for any and all mitigating evidence, regardless of its strength, quantity or quality. For more than ten years, the Fifth Circuit has drawn the line between Penry and non-Penry mitigation evidence under the test of whether the defendant's criminal act was "due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own."[19]

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[18] See *Robertson*, 325 F.3d at 245,252-53.

[19] *Id.* at 251 (quoting Graham v. Collins, 950 F.2d 1009, 1029 (5th Cir.1992) (en banc), aff'd, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993)). The Supreme Court granted certiorari in *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir.2002), cert granted sub nom. *Tennard v. Dretke*, — U.

This test takes into account the four principles set out by the Supreme Court in Penry: voluntariness, permanence, severity, and attribution.[20] If a disability is acquired involuntarily,[21] is of a permanent rather than transient nature,[22] is severe in *414 its impact upon the person,[23] [FN23] and is at least a partial cause or explanation of the criminal act,[24] then a

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S. — (2004) (No. 02-10038), to address whether the Court's reasoning in *Penry II* applies when evidence is admitted that the defendant is mentally "slow," but the capital crime cannot be attributed to that mental slowness. The disposition of that case, however, is not dispositive of applicant's claim. First, we do not read *Penry II* to expand upon the nature and scope of evidence that requires any additions to, or modification of, the pre-1991 Texas special issue scheme. See Robertson, 325 F.3d at 255-57. Second, applicant's mitigation evidence is more akin to that in *Robertson* than the mentally-slow evidence in *Tennard.* In other words, applicant's mitigating evidence did not show a severe handicap, much less a "uniquely" severe one.

[20] *Robertson,* 325 F.3d at 251.

[21] Thus, voluntary drug abuse, for example, does not qualify as constitutionally significant Penry evidence which requires a vehicle outside the scope of the statutory special issues. *See Barnard v. Collins*, 958 F.2d 634, 639 (5th Cir.1992).

[22] Youth, although it may be mitigating in a particular case, is not a permanent disability; those who survive it will outgrow it. Thus, a jury does not normally need any additional instructional vehicle, beyond the statutory special issues, to consider youth as a mitigating factor. See Graham, 950 F.2d at 1014.

[23] For example, dyslexia and an unfortunate childhood are not so severe that they require any additional instructional vehicle under *Penry I.* See *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir.1994); Barnard, 958 F.2d at 639. On the other hand, a defendant who suffers from chronic paranoid schizophrenia does suffer a severe mental condition that might very well contribute to his criminal actions. See *Bigby v. Cockrell*, 340 F.3d 259, 273 (5th Cir.2003).

[24] For example, childhood abuse might cause demonstrable psychological effects upon a person and the capital offense act might be attributable to, or at least related to those specific psychological effects. See Madden, 18 F.3d at 308. See generally, Robertson, 325 F.3d at 252-53. *Compare Blue v. Cockrell*, 298 F.3d 318, 321-22 (5th Cir.2002) (parental abandonment, physical and sexual abuse, schizophrenia, brain injury, and resulting

defendant is entitled to a vehicle by which to give effect to that evidence—either supplementary instructions or a special mitigation issue.

Here, applicant merely argues that he presented "significant mitigating evidence that was virtually indistinguishable from Penry's and thus undeniably beyond the scope of the special issues." This evidence, however, is not qualitatively or quantitatively similar to that offered by Penry.[25] A "slow learner" is not, *ipso facto*, mentally retarded. A person who attends special-education classes does not, by virtue of that fact alone, suffer a severe disability. A person who drops out of school in the ninth grade is not necessarily the victim of a permanent disability. Similarly, one who has a disadvantaged background or a difficult childhood is not necessarily the victim of a severe and permanent disability. Furthermore, applicant fails to explain how or why this evidence affected his ability to control or evaluate his conduct. Undoubtedly, the vast majority of Americans have suffered some difficulties, disadvantages, or dire disappointments in life. Generally, people are able to survive, surmount, and learn from those negative experiences.

Moreover, applicant fails to show how being a slow learner and having been burdened by a feckless father impacted his later behavior or criminal conduct.[26] Applicant offered no

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poor impulse control satisfied claim for specialized Penry mitigation instruction).

[25] In *Penry*, for example, the defendant had been diagnosed with organic brain damage, possibly caused at birth or by beatings and multiple brain injuries at an early age. Penry offered expert testimony that spoke of the unique character of the severe abuse he suffered, his limited cognitive faculties, and his inability to learn from his mistakes. 492 U. S. at 309-10, 109 S.Ct. 2934.

[26] See *Barnard*, 958 F.2d at 634 (defendant's childhood experiences did not support Penry claim in the absence of evidence that those experiences led to any mental impairment or psychological disability linked to later criminal conduct).

evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder. Although we need not decide whether *Penry* requires a defendant to show that the crime is directly "attributable" to the severe handicap, *Penry* surely stands for the proposition that there must be at least a logical, reasonable evidentiary relationship established between the disability and the defendant's criminal conduct or his moral blameworthiness. Applicant has failed to establish any such evidentiary link.

Furthermore, applicant has failed to show that any mitigating quality of his family background and mental-limitations evidence could not be fully encompassed by the two statutory special issues. Applicant's mental limitations were surely relevant to whether he acted deliberately in committing this robbery-murder and both his learning disability and troubled background were relevant to whether he would constitute a future danger to society. In *Penry*, the evidence supported an inference that the defendant was unable to learn from his mistakes as a result of his low I.Q., brain impairments, and severe childhood abuse. Thus, he was more likely to be a future danger because of his permanent disabilities. Here, the evidence shows the reverse: despite applicant's limitations and difficulties, his behavior in school was often "exemplary." There is no evidence that applicant was unable to learn from experience or unable to control his conduct, with or without his disabilities.[27] Applicant argues that:

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[27] *See, e.g., Graham*, 506 U.S. 461, 475-76, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (jury could have concluded from evidence of defendant's background that robbery-murder was an aberration and that he would not pose a future danger); *Davis v. Scott*, 51 F.3d 457, 464 (5th Cir.1995) (when defendant's difficult childhood background evidence did not demonstrate that he was unable to learn from his mistakes, but rather that he responded positively to a structured environment, second special issue provided sufficient vehicle for jury's consideration of mitigation evidence). In *Davis*, as in the present case, the evidence showed that the defendant was in special-education classes and suffered from a learning

> Evidence of Mr. Smith's troubled family life was simply beyond the scope of the first special issue (deliberateness) to the extent that the jury believed both that Mr. Smith acted deliberately and that his abusive background justified a sentence less than death. The same evidence worked only to his detriment on the second special issue (future dangerousness), because the jury could have concluded that an individual raised in an unstable and abusive environment would learn violence and be more likely to continue being violent as an adult. Thus, the second special issue did not allow the jury to use Mr. Smith's family life as a mitigating factor. Similarly, the fact that Mr. Smith is a slow learner, with a learning disability and speech handicap, would have no bearing on the first special issue except perhaps to hurt him and, under the circumstances, would only contribute to a "Yes" answer under the special issue.

But this is an argument that could be made about any specific piece of evidence—youth, old age, alcoholism, drug abuse, high intelligence, limited intelligence, poverty, disease, psychological impairments, and so forth. Conclusory assumptions and arguments are not sufficient to make out a Penry violation. One must first sort out the Penry "double-edged disability" mitigation evidence which cannot be given full effect under the statutory special issues from other, non-Penry mitigation evidence which can be given full effect under the special issues.

Therefore, we conclude that a defendant first must make a *prima facie* showing of a severe and permanent handicap, not

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disability. Nonetheless, the evidence also showed that Davis was a "tenderhearted, a very kind young man . . . cooperative . . . very creative, very calm, anxious to please." *Id.* at 465. Based upon that evidence, Davis's jury was not "compelled" to answer the second special issue affirmatively; it could give mitigating effect to the evidence presented without any special Penry vehicle. *Id.* The same is true in this case.

of his own making, which is at least related to the commission of the capital offense[28]. Second, the defendant must show that this disability evidence was effectively beyond the reach of the two special issues. Applicant has made neither showing. We conclude that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence.

C. The "nullification instruction" in this case was a sufficient vehicle to accord full weight to applicant's mitigation evidence.

Applicant also asserts that the extra-statutory mitigation instructions in this case were "virtually identical" to those given in *Penry II*. They are not. Only if the Supreme Court intended to say in *Penry II* that any and all nullification instructions are unconstitutional on their face are these instructions infirm.

In this case, unlike that in *Penry II*, the trial court's special instruction explicitly told the jury that it "shall consider any evidence, which, in your opinion, is mitigating."[29] It defined mitigating evidence as "evidence that reduces the defendant's personal or moral culpability or blameworthiness." It expressly informed the jury that "[y]ou may hear evidence which, in your judgment, has no relationship to any of the Special Issues. But if you find such evidence is mitigating under these instructions, you shall consider it" and "you shall answer at least one of the Special Issues 'No' "if you believe "that the death penalty should not be imposed due to the mitigating evidence presented to you."[30] Furthermore, the trial court instructed the jury that the State "must prove beyond a reasonable doubt that the death sentence should be

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[28] See *Robertson*, 325 F.3d at 251.

[29] Emphasis added. Compare supra, note 15 (instructions in Penry II).

[30] Emphasis added.

imposed despite the mitigating evidence, if any, admitted before you."

Thus, the present instruction not only told the jury that it "shall" consider all mitigating evidence, even evidence unrelated to the special issues, it also told the jury how to answer the special issues to give effect to that mitigation evidence.[31] Here, the jury did not have to read anything into the mitigation instruction or decide which instruction should control over the other one.[32] These instructions expressly authorized and required the jury to answer "No" to at least one of the special issues if it believed that the death penalty was not warranted because of the mitigating circumstances. The trial court's instructions clearly informed the jury that mitigation evidence "trumped" the special issues.[33]

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[31] In *Penry II*, the Supreme Court stated that "[a] clearly drafted catchall instruction on mitigating evidence also might have complied with *Penry I*." *532 U.S. at 803, 121 S.Ct. 1910*. Justice O'Connor then noted with approval that the Texas Legislature had, at its earliest opportunity, enacted a statutory third special issue which became effective September 1, 1991. That "nullification" special issue trumps the truthful answers to the first two special issues by means of the statutorily authorized third question. At the time of applicant's trial, however, trial courts did not have authority to create and submit this special "nullification" mitigation issue. However, the supplemental instruction given in this case came as close as possible to achieving the same purpose as the third special issue without the trial judge crossing the boundary of making up new special issues without legislative authorization.

[32] Compare *Penry II*, 532 U.S. at 797-98, 121 S.Ct. 1910 (one reading of instruction "told jurors to take *Penry's* mitigating evidence into account in determining their truthful answers to each special issue. Viewed in this light, however, the supplemental instruction placed the jury in no better position than was the jury in *Penry I*").

[33] The instruction did not instruct the jury to violate their oaths or answer either of the special issues "falsely," but rather to answer the special issues honestly in light of both the question itself and the defendant's mitigating evidence which, as the trial court clearly informed the jury, might or might not have direct relevance to those specific issues. This wording of this specific instruction, unlike that in *Penry II*, did not

This supplemental instruction, although dissimilar to that in *Penry II*, is similar to that in Robertson.[34] We agree with the Fifth Circuit's en banc conclusion that this supplemental instruction provided "a more capacious vehicle than was constitutionally warranted."[35] We also agree with that court's determination that:

> the supplemental instruction did not render the jury charge potentially contradictory. The jury was not forced into the position—as they were in *Penry II*—of falsely answering "no" to the questions of deliberateness or future dangerousness. The most that one could say is that the supplemental instruction was redundant in this case.[36]

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insert "an element of capriciousness" into the sentencing decision, "making the jurors' power to avoid the death penalty dependent on their willingness to elevate the supplemental instruction over the verdict form instructions." Compare *Penry II*, 532 U.S. at 800, 121 S.Ct. 1910. Instead, the supplemental instructions guided the jurors in answering the special issues by requiring them to consider all mitigating evidence of whatever sort and requiring them to give effect to that evidence by truthfully answering at least one of the special issues with a "No" if they determined that the State had failed to prove, beyond a reasonable doubt, that a death sentence should be imposed despite the mitigating evidence. See *Penry II*, 532 U.S. at 806-07, 121 S.Ct. 1910 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J. dissenting). We have confidence that jurors are capable of reading and understanding these particular supplemental instructions in a commonsense manner. This instruction is, in fact, more favorable to the defendant than the third, statutory "nullification" special issue that *Penry II* noted with approval because it explicitly put a burden on the State to prove, beyond a reasonable doubt, that the death penalty should be imposed despite any mitigating evidence. A reasonable jury would not likely be confused by these particular instructions.

[34] *Robertson*, 325 F.3d at 245 n.

[35] *Id.* at 258.

[36] *Id.* Compare Bigby v. Cockrell, 340 F.3d 259, 275-77 (5th Cir.2003) (supplemental instruction that was "almost identical" to that in *Penry II* suffered same constitutional infirmity as in that case).

Therefore, we conclude, as the Fifth Circuit did in *Robertson*, that the supplemental instruction in this case was not error of any sort.[37]

Because we find no constitutional infirmity under either *Penry I* or *Penry II* in this case, we agree with the trial court's recommendation that applicant's request for habeas corpus relief be denied. We therefore deny relief.

HERVEY, *J.*, filed a concurring opinion in which KEASLER, *J.*, joined.

HOLCOMB, J., filed a concurring opinion in which PRICE, J., joined.

[37] Robertson, 325 F.3d at 258.

HERVEY, *J.*, filed a concurring opinion in which KEASLER, *J.*, joined.

I join Parts II.A. and II.B. of the Court's opinion. We filed and set for submission applicant's post-conviction claim that the special issues and the "nullification" mitigating evidence instruction submitted at the punishment phase of his 1991 capital murder trial did not provide the jury with a vehicle to give effect to mitigating evidence in violation of the Eighth Amendment and the United States Supreme Court's decision in Penry v. Johnson, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*).

I.

The State suggests that this Court might not have jurisdiction to consider the merits of this claim because it is raised in a successive habeas application. This Court has jurisdiction to consider the merits of this claim. See Article 11.071, § 4A(f), Tex.Code Crim.Proc.; Ex parte *Smith*, 977 S.W.2d 610, 611 (Tex.Cr.App.1998).

II.

In *Penry II*, the Supreme Court decided that the special issues and a "nullification" mitigating evidence instruction submitted at Penry's resentencing hearing failed to provide Penry's jury with an adequate vehicle to give mitigating effect to constitutionally relevant mitigating evidence of Penry's severe childhood abuse and mental retardation that tended to explain Penry's commission of the offense. See *Penry II*, 121 S.Ct. at 1915, 1921-22; *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2947-49, 106 L.Ed.2d 256 (1989) (*Penry I*). The Court reasoned that: (1) the special issues provided the jury with no vehicle to give mitigating effect to this evidence, and (2) the "nullification" instruction was an "inadequate vehicle" to give mitigating effect to this evidence because it was confusing and it contradicted the special issues making it "logically and ethically impossible for a juror to

follow both sets of instructions." See *Penry II*, 121 S.Ct. at 1915, 1921-22; *Penry I*, 109 S.Ct. at 2947, 2949. The "less than artful" portion of the "nullification" instruction which the Supreme Court found objectionable stated:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

Penry II, 121 S.Ct. at 1921.

III.

In this case, applicant was convicted of murdering a former female coworker during a robbery of a Taco Bell restaurant. Applicant tortured the terrified young victim before brutally killing her. Consistent with the evidence presented at applicant's 1991 trial, the prosecution provided the following summary of its theory of the case to the jury at applicant's 1991 trial.

> . . . [Applicant] goes on back to where [the victim] is in that back office, and you heard from the witnesses about how they saw him pistol whipping her about her head. "What's the combination, Jennifer, to open the safe?" "I can't. I don't know it. I don't know it. I can't open the safe. I can't. I don't know it." You know that he proceeded to pistol whip her about the head. You know after that that he shot her in the back, right back here behind the left shoulder bone, came out right underneath

her left breast, and what did she say? "God, please don't let me die." But that wasn't enough.

Is there any question about whether or not his conduct was deliberate? It wasn't enough to pistol whip her, and it wasn't enough to shoot her in the back with that gun. So, what is the next thing that he does? "Well, she's not dead yet, you see. She's still alive. She still might give me the combination to the safe," or open it up for him. So, what does he do? He goes back into the kitchen area, grabs a butcher knife—and you saw that knife—and he comes back in there, and I submit to you, and you heard from the testimony of Dr. Davis, the medical examiner—what did he tell you? Let's talk about how he went about killing her. Let's talk about it. He said the cause of death was multiple stab wounds and the gunshot wound to the back. He told you, and I submit to you--he told you he can't tell you the order that those wounds occurred, but I submit to you that it went something like this: Pistol whipped her, she still wouldn't comply, then he shot her in the back. She still is saying, "I don't know the combination of the safe." He gets the butcher knife. He comes back--and Dr. Davis told you about those little cluster wounds. "Tell me the combination, Jennifer." "I don't know it." Nick, nick, nick, nick, right underneath her left breast. "Give me the combination, Jennifer." "I can't." Then I submit to you that he proceeded to stab her in the thigh and in the abdomen and in the head, and you know about that fatal wound, that gaping slash, on the side of her neck.

Applicant also presented what he claimed was mitigating evidence at his 1991 trial. Applicant's writ (with citations to the 1991 trial record omitted) sets out the following evidence which applicant claims was mitigating.

During trial, Applicant presented mitigating evidence. Applicant showed Sandier exaggerated the extent of his injuries

incurred during the bat incident [in which applicant assaulted Sandier with a baseball bat]. Applicant showed he was docile when confronted and arrested by the police. Although Applicant's teachers and principals found Applicant was disruptive and disrespectful, Applicant never got into any trouble so serious that required the intervention of the Youth Division of the Dallas Police Department at Carter High School. Similarly, Applicant never found himself in the sort of trouble that required the intervention of the Youth Action Center, which was precisely where Applicant would have gone if he had been involved in anything that was beyond the scope of the teachers and principals to handle effectively. Applicant's pastor thought highly of him but acknowledged, realistically, that some of Applicant's problems could be attributed to the fact he was a teenager and to the fact Applicant's father had seriously destabilized Applicant's family. Applicant showed he was medically diagnosed as a slow learner. Applicant showed he was learning disabled and speech handicapped. Applicant had an IQ of 78. Applicant showed that, notwithstanding the fact he was failing in special education, he was promoted. Applicant showed he was not a disruptive force when in a prison environment. Applicant showed that his friends, family, and neighbors liked and respected him for his loyalty, thoughtfulness, generosity, and willingness to assume responsibility. The offense for which Applicant was convicted is inconsistent with his history. Additionally, the violence and brutality of the offense are inconsistent with Applicant's past behavior.[1]

The record from the punishment phase of applicant's 1991 trial reflects that the "deliberateness" and "future dangerousness" special issues were submitted to the jury along with

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[1] The 1991 trial record further indicates that applicant presented evidence that applicant's father was a drug addict and neglected applicant. The father also stole from the family to support his drug habit and this upset applicant. The father eventually left applicant's home.

a "nullification" mitigating evidence instruction which allowed the jury to give effect to applicant's mitigating evidence "beyond the scope of the special issues" by authorizing a "no" answer to one of the special issues. This instruction provided:

> You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.
>
> In answering the special issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the special issues are "Yes," and you also believe from the mitigating evidence, if any, that the defendant should not be sentenced to death, then you shall answer at least one of the special issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death

sentence should be imposed despite mitigating evidence, if any, admitted before you.

The 1991 trial record further reflects that, during voir dire, this instruction and how it operated was very carefully explained to each veniremember who sat on appellant's jury and that these veniremembers stated that they understood it. For example, Juror # 7 stated:

> Q. [PROSECUTION]: I want to throw another wrinkle in on these [special issues]. Assuming that you hear evidence that convinces you [the special issues] should be answered yes, okay, the law is going to give you--the Court would give you a further instruction, and it has to do with what's called mitigating evidence. Mitigating evidence has--means, basically, some type of evidence that would lessen a person's responsibility for his action, okay? For example, let's say that they are retarded or they have a drug or alcohol problem or they have been abused as a child.
>
> Those factors might be considered by a juror to be mitigating. They might decide, "Well, you know, because of what I've heard, I know the guy did the crime, and I know these questions technically are answered yes, you know, he did it deliberately and there's a future threat, but because was what I've heard, this mitigating evidence, I don't feel the person should die for what he did. In my heart, I don't think he should die because of these factors."
>
> The judge is going to tell you if that's the case, you can go back and change one of these answers to no to give effect to that feeling. The reason for that is there's nothing in these questions that you can really factor that in. There's nothing in there to say anything about his mental state or whether or not he had a problem growing up.

Now, if that evidence is raised, you're going to have that consideration—that option to change one of these answers. And, you know, what's mitigating to one juror may not be to another. You all are going to have to decide, if you hear it, if you think that's enough to prevent the death sentence. One juror—you may hear that the guy was on drugs when he committed the offense. If you hear something like that, you can see how one juror might say, "Well, I can see how that kind of excuses, kind of, maybe. If he hadn't been doing drugs, he wouldn't have done this, and because of that, I don't think he needs to die." Juror, you know, number two might look at you and say, "Well, I think that's even worse. He shouldn't have even done the drugs to start with. That makes it even worse that he's doing drugs and killing people."

The point I'm getting at is that you know what's mitigating, you all are going to have to decide that, and what's mitigating to one person may not be to another. That phrase, that's about as big a definition as you're going to get about that. You'll have to decide that.

So if you hear that type of evidence, you're going to be faced with a couple of questions. One is, first of all, is it mitigating? And secondly, is it mitigating to the point where you don't believe the death sentence should be assessed? If that's the case, you're going to have an option to change an answer.

Do you feel that you could do that if you heard the proper facts?

A. [JUROR # 7]: Uh-huh.

. . .

Q. [DEFENSE]: [Juror # 7, the prosecutor] has talked to you, also, and told you that this scheme of special issues

is kind of skewed because a jury can still believe that an act was done deliberately and that he could be a future threat to society but still believe that he should die. It could be his role in the murder. It could be just a fairness issue in terms of other people involved, what has happened to them.

It could be any number of things, but a juror could, in essence, just say, "I don't think he should die." Then if all you have are those two questions, and if you honestly believe the answers were yes, then the person would be killed even though the jury still felt he should live.

And the legislature hasn't quite caught up to the law. The Supreme Court has recognized that, and, ideally, there should probably be a fourth special issue saying regardless of answers one through three, do you feel there is mitigating evidence such that it should save his life or some phrase like that.

I probably wouldn't be a very good legislator since I can't draft it, but that's not the way the law is now. That's not the way the statute is, but the judge would give you in the court's charge an instruction that says if you find there is mitigating evidence, and if you believe that that should save him from the death penalty, then you shall—shall is the big legal word for must—shall change one of the answers to no so that you can give effect to your heartfelt beliefs.

In other words, if there's two yes answers, the judge has to sentence him to death. If there is one no, he gets a life sentence. Those are the only two options. And so the law has said that the only way the judge could give effect to the jury's true belief is if one answer was no.

Do you feel that if you heard mitigating evidence and if you felt that regardless of whether he would be a threat in the future and regardless of whether you felt the act

was done deliberately, if you felt that he should not die, could you go back and, in essence, erase one of the yeses and put no in order to give effect and meaning to your true feelings?

A. [JUROR # 7]: Yes.
Q. [DEFENSE]: I mean, that's what the Court would tell you all to do, that you're allowed to do, and if you felt he should live, then the Court says you shall change one of the answers. In other words, you're not cheating or not giving a true verdict, you're following the Court's law or the Court's rules.[2]

Do you have any problem with that, ma'am?

A. [JUROR # 7]: Huh-uh.

Q. [DEFENSE]: Do you understand why that particular charge would be in there?

A. [JUROR # 7]: Yes.

Juror # 10 similarly stated.

Q. [DEFENSE]:—and if it didn't make sense, you could discard it? Okay. The law—kind of getting back to those two questions, it used to be that there were no questions and the jury has—like I was kind of saying or trying to say earlier, they had a wide discretion on what to do. That before these special issues came into being, juries would just decide whether it should be life or death, 15 years probation, whatever. Because of the way they're structured, two "yes" answers equals death, and there's no secret. We're not, you know, trying to hide the law or anything. It's all up front. It's come to the court's attention, primarily, because the legislature is a little bit

[2] But *see Penry II*, 121 S.Ct. at 1922 (claiming that this could have

behind the court's decisions that this format may not be entirely fair because jurors could believe that the person—there's a probability that they would be a continuing threat to society, but still believe that the person shouldn't die. In other words, through the whole ball of wax, through the trial and the guilt-innocence and punishment phase, they could just believe that under this fact situation with this person, he should die, and by just answering mechanically "yes" and "yes," if that's a true answer, you could never save the person. Like the prosecutor was telling you, the court will indicate that if you believe through what's called mitigating evidence—that's really anything. It's stuff you could hear in the guilt-innocence phase; it's stuff that you could hear in the punishment phase; it's the whole totality of circumstances—if you felt that he shouldn't die, then you're authorized—actually the court says you shall, which is legal mumbo-jumbo for must, change one of the answers from "yes" to "no" if you feel that he should not die.

Do you have any problem with that?

A. [JUROR # 10]: No.
Q. [DEFENSE]: Okay. I mean, it's not like you're cheating or lying or doing something—
A. [JUROR # 10]: No.
Q. [DEFENSE]: —to change it. That's what the Court would tell you to do to give effect to your heartfelt belief that he should live, okay? Also these two special issues are kind of designed to be high hurdles. In other words, the law is trying to decide of all the people that commit capital murders, murders in the course of robbery, why should some live and some die. They're trying, I think, to remove the—they called it, I think, arbitrary and freakish dispositions or impositions of the death sentence or capriciously done, something like that, that there's no rhyme or reason to it. I think what the

> legislature is trying to do is set certain barriers or hurdles for the State to get over before a person should be killed, and they're supposed to be high hurdles. In other words, the standard is beyond a reasonable doubt. They're looking for a deliberate act. They're looking for future dangerousness. On top of all that, they're looking for no mitigation to change the answers.
>
> Do you have any problem with the way those special issues are designed and how you could answer them if you felt he should live instead of die?
>
> A. [JUROR # 10]: No.[3]

During closing jury arguments at the punishment phase, applicant reminded the jury of the procedure that was carefully explained to them during voir dire.

> I want to talk to you about mitigating evidence. Mitigating evidence is that evidence that reduces the defendant's personal or moral culpability and may include, but is not limited to, any aspect of his character, record, background, or circumstances of the offense. It may go to one of the special issues, it may not, but the Court tells you that the State has a burden--that if you think that he should not die, you are to put "no" in one of the spaces, that the State has the burden of proof beyond a reasonable doubt to convince each and everyone of you that he should still die.[4]

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[3] The Supreme Court discounted similar voir dire proceedings in *Penry II* by explaining that the jurors (at least those in that case) "surely" had "a distant and convoluted memory" of those voir dire proceedings by the time they began their punishment phase deliberations. See *Penry II*, 121 S.Ct. at 1922-23.

[4] The Supreme Court discounted a similar argument made by the defense in *Penry II* by explaining that this "only reminded the jurors that they had to answer the special issues dis honestly in order to give effect to Penry's mitigating evidence." *See Penry II*, 121 S.Ct. at 1923 (emphasis in original).

IV.

I would decide that applicant procedurally defaulted the claim that he makes for the first time in this habeas proceeding. It must be kept in mind that *Penry I* had been decided at the time of applicant's 1991 trial and that *Penry II* did not break new ground or announce any new rules because it decided only that the jury instructions at Penry's retrial did not comply with *Penry I*'s mandate. See *Penry II*, 121 S.Ct. at 1915, 1924; *Robertson v. Cockrell*, 325 F.3d 243, 255-57 (5th Cir.), *cert. denied*, 539 U.S. 979, 124 S.Ct. 28, 156 L.Ed.2d 691 (2003) (*Penry II* only reiterated the holding of *Penry I*).

The record reflects that applicant did not object to the "nullification" instruction at his 1991 trial. *Compare Penry II*, 121 S.Ct. at 1923 (stating that Penry offered definitions to the charge that the trial court refused to give). On the contrary, a review of the 1991 trial record (particularly the individual voir dire) indicates that applicant was satisfied with the "nullification" instruction. Almost 13 years later but before the Supreme Court decided *Penry II*, applicant filed this habeas application in which he claimed for the first time that the conflicting instructions in the charge precluded the jury from giving effect to mitigating evidence. Echoing the Supreme Court's later decision in *Penry II*, applicant argued in support of this claim that it "confounds common sense to suggest jurors—who are sworn to tell the truth—would ever understand that they were authorized to answer [the special issues] falsely, and yet this is precisely what the 'nullification' instruction invited the jury to do."

Applicant presents no reason why he could not have raised this claim at his 1991 trial. Applicant also presents no reason why he could not have raised this claim on direct appeal. On direct appeal, applicant claimed only that we should have reconsidered our post-*Penry I* precedents because they had "unconstitutionally narrowed the sentencer's discretion to

consider relevant mitigating evidence." Applicant, of course, did not raise this claim at his 1991 trial.

One might suggest that applicant could not have raised the claim that he raised in his habeas application before the Supreme Court decided *Penry II*. But, applicant did raise this claim in his habeas application before the Supreme Court decided *Penry II*. There is no reason why he could not have raised it 13 years ago. Applicant, therefore, procedurally defaulted the claim that he raises for the first time in this habeas corpus proceeding.

V.

Notwithstanding the foregoing, the claim that applicant raises for the first time in this habeas corpus proceeding lacks substantive merit. In addressing applicant's claim that his jury had no vehicle to give effect to his mitigating evidence, it is helpful to briefly summarize our *post-Penry I* mitigating evidence jurisprudence. The Supreme Court in Jurek and several other cases has upheld the constitutionality of Texas' special issues framework because these special issues generally provide a jury with a vehicle to meaningfully give effect to relevant mitigating evidence. *See, e.g., Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976); *Graham v. Collins*, 506 U.S. 461, 113 S.Ct. 892, 901, 122 L.Ed.2d 260 (1993). In *Penry I*, the Supreme Court decided only that this framework was unconstitutionally applied to Penry because it did not provide the jury with a vehicle to give mitigating effect to Penry's evidence of mental retardation and severe childhood abuse that tended to explain his commission of the offense. *See Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2947-49, 106 L.Ed.2d 256 (1989). We were assured, however, that *Penry I* did not "effec[t] a sea change in [the Supreme Court's] view of the constitutionality of the former Texas death penalty statute." *See Graham*, 113 S.Ct. at 901.

Some members of this Court believed that *Penry I* required in every case another jury instruction to provide a jury with a vehicle to give effect to any mitigating evidence "beyond the scope of the special issues." Realizing that this view would have effected a "sea change" in the constitutionality of the "former Texas death penalty statute," this Court's post-*Penry I* precedents narrowly read *Penry I* and decided in numerous cases that the special issues provided a jury with a vehicle to meaningfully give effect to mitigating evidence such as that presented in this case.[5]

This Court's post-*Penry I* precedents also decided that a defendant had to establish a "nexus" between his claimed mitigating evidence and the offense (that tended to excuse the defendant's commission of the offense) before the defendant was entitled to another jury instruction to give effect to this evidence beyond the scope of the special issues. See Footnote 6. This "nexus" requirement was based on *Penry I*'s definition of constitutionally relevant mitigating evidence. See *Penry I*, 109 S.Ct. at 2947; *Richardson v. State*, 901 S.W.2d 941, 942 (Tex.Cr.App.1994); *Lackey*, 819 S.W.2d at 134-35.[6]

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[5] *See Lackey v. State*, 819 S.W.2d 111, 128-36 (Tex.Cr.App.1989); *Mines v. State*, 888 S.W.2d 816, 818-21 (Tex.Cr.App.1994) (Baird, J., concurring) and cases cited.

[6] In Richardson, we noted that *Penry I* states that a defendant presents relevant mitigating evidence when he presents evidence that his criminal acts "are attributable to a disadvantaged background, or to emotional and mental problems." *See Richardson*, 901 S.W.2d at 942; *Lackey*, 819 S.W.2d at 134-35. *Penry I*, 109 S.Ct. at 2947 (internal quotes omitted), literally states:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

Some claimed that this was a "crabbed interpretation" of *Penry I*.[7] As it turned out, the Supreme Court upheld this "crabbed interpretation" of *Penry I* in *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) which decided that the Constitution does not require that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant" and that *Penry I* is satisfied as long as relevant mitigating evidence is within "the effective reach of the sentencer." *See Johnson*, 113 S.Ct. at 2669.[8] When relevant mitigating evidence is within "the effective reach of the sentencer," no separate jury instruction is required to provide a jury with a vehicle to give effect to this evidence beyond the scope of the special issues even if there is a "nexus" between this evidence and the offense. *See Johnson*, 113 S.Ct. at 2669; Richardson, 901 S.W.2d at 941-42; *Richardson*, 886 S.W.2d at 771-76. A separate jury instruction is required only when the special issues place constitutionally relevant mitigating evidence completely beyond "the effective reach of the sentencer." See Johnson, 113 S.Ct. at 2669; *see also Penry II*, 121 S.Ct. at 1922 (reasonable likelihood that "nullification" instruction prevented jury from considering constitutionally relevant mitigating evidence); *Penry I*, 109 S.Ct. at 2949 (reasonable likelihood that the special issues prevented the jury from considering constitutionally relevant mitigating evidence).

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[7] *See Richardson v. State*, 886 S.W.2d 769, 777-79 (Tex.Cr.App.1991) (Clinton, J., dissenting) (claiming that "essence of the Supreme Court's holding" in *Penry I* required that a "jury must be empowered to give mitigating evidence all the effect to which it is susceptible"); *see also Richardson*, 901 S.W.2d at 941-42 and at 942-43 (Clinton, J., dissenting).

[8] We note that *Penry II* cites to a dissenting opinion in *Johnson* followed by a parenthetical stating that a "sentencer [must] be allowed to give full consideration and full effect to mitigating circumstances." See *Penry II*, 121 S.Ct. at 1920 citing Johnson, 113 S.Ct. at 2676 (O'Connor, dissenting) (emphasis in original). I do not understand this part of *Penry II* as having silently overruled *Johnson*.

Our post-*Penry I* precedents are also consistent with the Fifth Circuit's post-*Penry I* jurisprudence. See Robertson, 325 F.3d at 248-55. The Fifth Circuit has also concluded that *Penry II* did not disturb this post-*Penry I* jurisprudence. See Robertson, 325 F.3d at 255-57 (rejecting any suggestion that *Penry II* silently modified *Penry I* and encroached upon Jurek). With these comments in Section V. of this opinion, I join parts II.A. and II.B. of the Court's opinion.

VI.

With all of this in mind, it is clear that applicant's jury could have meaningfully given mitigating effect to any relevant mitigating evidence in answering the special issues. This Court would also have to ignore a significant number of its precedents as well as Fifth Circuit case law to hold otherwise.[9] The "nullification" mitigating evidence instruction at applicant's 1991 trial, therefore, provided applicant more than what he was constitutionally entitled to receive. *See Johnson*, 113 S.Ct. at 2669; *Robertson*, 325 F.3d at 257-58 ("nullification" instruction provided the defendant "with a more capacious vehicle than was constitutionally warranted").

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[9] *See, e.g., Mines*, 888 S.W.2d at 818-21 (Baird, J., concurring) and cases cited (evidence of brain damage, violent family background, growing up in poverty, voluntary intoxication, drug abuse, suicide attempt, lack of education, being a good and loving child, critical illness as a child, voluntary service, good character evidence, abusive childhood, remorse, general good character evidence, mental instability can be given mitigating effect when answering the special issues); *Lackey*, 819 S.W.2d at 128, 134 (evidence of "a low level of intelligence, shown by extremely substandard IQ test scores," poor school record, turbulent childhood and troubled relationship with father, and youth could be given mitigating effect when answering the special issues); Robertson, 325 F.3d at 249-51 (additional instructional vehicles not required for many different types of mitigating evidence, including but not limited to, subnormal intelligence, youth, troubled or abused childhood, intoxication, substance abuse, head injury, good character, mental illness, antisocial personality disorders, and dyslexia).

It has been suggested that applicant's "criminal conduct was in some way attributable to his unfortunate childhood experiences" which would have entitled him to a charge that provided the jury with a vehicle to give effect to this evidence beyond the scope of the special issues. Applicant was not entitled to such a charge because "there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination." *See Johnson*, 113 S.Ct. at 2669; *Lackey*, 819 S.W.2d at 134 (evidence of defendant's "limited intellectual and mental capability, his problematic relationship with his father, physical abuse by his father, and his age at the time of the offense is relevant to a proper resolution of the concerns" of the future dangerousness special issue); *Robertson*, 325 F.3d at 253 (statutory special issues were adequate to allow jury to effectuate the mitigating potential of defendant's claim of childhood abuse because this evidence exhibited no "nexus to his brutal crimes").

Applicant's evidence of "unfortunate childhood experiences," like the evidence of the "ill effects of youth" in Johnson, could have been "readily comprehended as a mitigating factor in consideration of the [future dangerousness] special issue." *See Johnson*, 113 S.Ct. at 2669-70. In *Johnson*, 113 S.Ct. at 2669-70, the Court stated:

> That the jury had a meaningful basis to consider the relevant mitigating qualities of petitioner's youth is what distinguishes this case from [*Penry I*]. In [*Penry I*], there was expert medical testimony that the defendant was mentally retarded and that this condition prevented him from learning from experience. (Citation omitted). Although the evidence of the mental illness fell short of providing Penry a defense to prosecution for his crimes, the Court held that the second special issue did not allow the jury to give mitigating effect to this evidence. Penry's condition left him unable to learn from his

mistakes, and the Court reasoned that the only logical manner in which the evidence of his mental retardation could be considered within the future dangerousness inquiry was as an aggravating factor. (Citation omitted). [*Penry I*] remains the law and must be given a fair reading. The evidence of petitioner's youth, however, falls outside [*Penry I*'s] ambit. Unlike Penry's mental retardation, which rendered him unable to learn from his mistakes, the ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue.

Petitioner does not contest that the evidence of youth could be given some effect under the second special issue. Instead, petitioner argues that the forward-looking perspective of the future dangerousness inquiry did not allow the jury to take account of how petitioner's youth bore upon his personal culpability for the murder he committed. According to petitioner, "[a] prediction of future behavior is not the same thing as an assessment of moral culpability for a crime already committed." (Citation omitted). Contrary to petitioner's suggestion, however, this forward-looking inquiry is not independent of an assessment of personal culpability. It is both logical and fair for the jury to make its determination of a defendant's future dangerousness by asking the extent to which youth influenced the defendant's conduct. (Citation omitted). If any jurors believed that the transient qualities of petitioner's youth made him less culpable for the murder, there is no reasonable likelihood that those jurors would have deemed themselves foreclosed from considering that in evaluating petitioner's future dangerousness. It is true that Texas has structured consideration of the relevant qualities of petitioner's youth, but in so doing, the State still "allow[s] the jury to give effect to

> [this] mitigating evidence in making the sentencing decision." (Citation omitted). Although Texas might have provided other vehicles for consideration of petitioner's youth, no additional instruction beyond that given was required in order for the jury to be able to consider the mitigating qualities of youth presented to it.

VII.

It is unnecessary for the Court to state in Part II.C. of its opinion that, as a matter of federal constitutional law, the "nullification" instruction here was a sufficient vehicle to accord "full" weight to applicant's mitigation evidence. The Constitution does not require a vehicle to accord "full" weight to a defendant's mitigation evidence. See Johnson, 113 S.Ct. at 2669 (Constitution does not require that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant"). In addition, the "nullification" instruction would, as a matter of federal constitutional law, suffer from the same defect as the one in *Penry II* had applicant presented any mitigating evidence that was beyond "the effective reach of the sentencer." See *Penry II*, 121 S.Ct. at 1915, 1921-22; Johnson, 113 S.Ct. at 2669. It is dispositive of applicant's federal constitutional claim in this case to simply decide that the special issues submitted at applicant's 1991 trial provided the jury with a vehicle to give constitutionally sufficient mitigating effect to applicant's mitigating evidence and that this evidence was within "the effective reach of the sentencer." *See id.*

VIII.

Finally, having decided that no federal constitutional violation occurred in this case, we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable "nullification" instruction such as the one in this case. *But see Penry II*, 121 S.Ct. at 1922-23.

The record in this case clearly reflects that there was no reasonable likelihood that the jury applied the "nullification" instruction in a way that prevented it from considering and giving effect to constitutionally relevant mitigating evidence even beyond the scope of the special issues. Cf. *Penry II*, 121 S.Ct. at 1922 (federal constitutional issue is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant mitigating evidence). Even though it may not have done so as a matter of federal constitutional law, the "nullification" instruction did, as a matter of fact, provide the jury with a vehicle to accord "full" weight to applicant's mitigation evidence.

I concur in the Court's judgment to deny habeas corpus relief.

HOLCOMB, *J.*, filed a concurring opinion in which PRICE, *J.*, joined.

OPINION

I agree with the majority that the petitioner is not entitled to relief on habeas corpus. However, I do so only because I am compelled by the facts to agree with the concurrence that Smith procedurally defaulted the claim he now raises, that his nullification instruction was insufficient under *Penry II*,[1] precluding the jury from giving effect to his mitigating evidence. Smith did not object to the nullification instruction during his trial in 1991. An objection at that time would not have been futile because this Court had not yet addressed the issue. We addressed the issue in 1992 when we decided Fuller[2] and held that a nullification instruction was sufficient under *Penry I*. Thus, I concur with the result. However, I am concerned regarding the application of procedural default in cases in which the consequences are so dire and where the claim raised is meritorious.

I write to dissent to the majority's reasoning and resolution of Smith's claim on the merits. Under *Penry I*, a defendant is entitled to a supplemental instruction if there is mitigating evidence that is (1) relevant to the defendant's moral culpability for the offense and (2) beyond the scope of the special issues. The evidence Smith produced satisfied these two requirements. Therefore, he was entitled to a supplemental instruction to provide the jury with a vehicle to consider and give effect to that evidence. The nullification instruction provided to Smith's jury contained the same defects the Supreme Court identified in *Penry II*. Therefore, the jury was unconstitutionally precluded from considering and giving effect to Smith's mitigating evidence.

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[1] *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*).

[2] *Fuller v. State*, 829 S.W.2d 191, 209 (Tex.Crim.App.1992).

The majority errs in choosing to adopt what is essentially the Fifth Circuit's *Penry I* construct limiting the application of *Penry I*'s holding to cases in which the evidence demonstrate a uniquely severe permanent handicap. The majority also errs in finding Smith's nullification instruction to be sufficiently distinguishable from Penry's that Smith's nullification instruction would provide a sufficient vehicle under *Penry I*. Therefore, I dissent.

Penry I's Supplemental instruction requirement

In general, the Court in *Penry I* recognized that when a defendant presents mitigating evidence relevant to his personal moral culpability but not relevant to the special issues or relevant to the special issues only as an aggravating factor, the special issues alone would not allow the jury to give effect to the mitigating quality the evidence presented.[3] In that situation, the State must provide an additional vehicle to the jury so that the jury may consider and give effect to the evidence. Therefore, the defendant's mitigating evidence necessitates a *Penry I* instruction when: (1) the evidence is relevant to the defendant's moral culpability, and (2) the mitigating quality of such evidence cannot be given effect under the special issues alone.

Regarding the first requirement, with respect to *Penry I* claims, this Court has focused on whether the evidence demonstrated a nexus between the mitigating circumstance and the offense.[4] This nexus requirement is rooted in the follow-

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[3] *See Penry I*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256.

[4] *Goss v. State*, 826 S.W.2d 162 (Tex.Crim.App.1992). *See also Zimmerman v. State*, 881 S.W.2d 360 (Tex.Crim.App.1994); *Earhart v. State*, 877 S.W.2d 759 (Tex.Crim.App.1994); *Mines v. State*, 888 S.W.2d 816 (Tex.Crim.App.1994); *Satterwhite v. State*, 858 S.W.2d 412 (Tex. Crim. App.1993); *Muniz v. State*, 851 S.W.2d 238 (Tex.Crim. App.1993); *Richardson v. State*, 879 S.W.2d 874 (Tex.Crim.App.1993); *Richard v. State*, 842 S.W.2d 279 (Tex.Crim.App.1992); *Nobles v. State*, 843 S.W.2d 503 (Tex.Crim.App.1992); *Lackey v. State*, 819 S.W.2d 111 (Tex.

ing statement from Justice O'Connor's concurring opinion in California v. Brown[5] that was adopted by the majority of the Supreme Court in *Penry I*:[6]

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.[7]

This statement followed the Court's summary of its holding in Eddings[8] that "a sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death."[9] Thus, the Supreme Court established the nexus requirement as the way to determine when evidence that might be considered mitigating is relevant to the defendant's moral culpability, and, thus also to whether the death penalty is appropriate for the defendant. While the Supreme Court has not used the term "nexus," this label encapsulates the Supreme Court's reasoning.

This Court has not previously interpreted *Penry I* to require the mitigating circumstance about which evidence is pre-

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Crim.App.1989), *opinion on motion for rehearing*, 816 S.W.2d 392 n. 10 (Tex.Crim.App.1991); *Gribble v. State*, 808 S.W.2d 65 (Tex. Crim.App.1990) (plurality opinion) (suggested requirement).

[5] *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987).

[6] *See Lackey*, 819 S.W.2d at 135 n. 10.

[7] *Penry I*, 492 U.S. at 319, 109 S.Ct. 2934.

[8] *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

[9] *Penry I*, 492 U.S. at 318, 109 S.Ct. 2934.

sented to be unique, severe, permanent, or a handicap. We have found that certain evidence "fails to rise to the level of Penry evidence,"[10] or is "not the same quality and character as Penry's."[11] These statements, however, were made in the context of determining whether a nexus existed between the mitigating circumstance and the defendant's moral culpability, thereby allowing the jury to find the defendant less culpable by contemporary moral values.[12]

In Mines,[13] we considered the permanence of the mitigating circumstance to be relevant to a determination of whether the evidence necessitated a *Penry I* instruction. However, we considered it relevant to the issue of whether the jury could give mitigating effect to the evidence within the special issues and not to whether the evidence demonstrated a nexus between the mitigating circumstance and the defendant's moral culpability for the crime.[14]

Regarding the second requirement, the Court in *Penry I* not only found that the evidence regarding mental retardation was relevant to the question of deliberateness, but also determined that the evidence had mitigating relevance beyond the scope of the special issue.[15] The Court held that without an instruction defining "deliberately" to mean that the jury must consider mitigating evidence fully as it bears on personal culpability, the Court could not be sure that the jury was able to give effect to the mitigating evidence through the deliberateness question.[16] The Court determined that the evidence

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[10] *Cantu v. State*, 842 S.W.2d 667, 693 (Tex.Crim.App.1992); *Earhart v. State*, 823 S.W.2d 607, 632 (Tex.Crim.App.1991).

[11] *Goss v. State*, 826 S.W.2d 162, 166 (Tex.Crim.App.1992).

[12] *Richardson v. State*, 879 S.W.2d 874, 885 (Tex. Crim.App.1993).

[13] *Mines v. State*, 888 S.W.2d 816, 817-818 (Tex.Crim.App.1994).

[14] *Id.*

[15] *Penry I*, 492 U.S. at 322, 109 S.Ct. 2934.

[16] *Penry I*, 492 U.S. at 322, 109 S.Ct. 2934.

was also relevant to the future dangerousness question, but only as an aggravating factor, placing the mitigating relevance beyond the scope of the special issues.[17] The Court cited the concurrence from Franklin[18] stating that an Eighth Amendment analysis is required if mitigating evidence is introduced that is not relevant or that has relevance beyond the scope of the special issues.[19]

Although our *Penry I* decisions may be consistent with those of the Fifth Circuit, the Fifth Circuit's decisions are not necessarily consistent with our precedent. In addition to the nexus and scope requirements we have applied to *Penry I* cases, the Fifth Circuit has imposed an independent, multi-faceted requirement that the evidence must demonstrate that the mitigating circumstance constitutes a uniquely severe permanent handicap. Though we have interpreted *Penry I* narrowly, I do not believe we have, nor do I believe it should be, interpreted as narrowly as the Fifth Circuit has done. The majority and concurrence appear to ignore our precedent in favor of the Fifth Circuit's *Penry I* test. I think this is a grave injustice. While the factors involved in the Fifth Circuit's independent requirement may be helpful to consider in determining whether a defendant's evidence meets the nexus and scope requirements, as they were in *Penry I*, they should not be determining factors. Such an interpretation undermines the reasoning in *Penry I*, because a defendant whose mitigating evidence meets the nexus and scope requirements may still be deprived of a supplemental instruction so that the jury is precluded from considering and giving effect to evidence relevant to the defendant's moral culpability for the offense.

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[17] *Penry I*, 492 U.S. at 323, 109 S.Ct. 2934.

[18] *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988).

[19] *Penry I*, 492 U.S. at 321, 109 S.Ct. 2934.

Our precedent, without adopting the Fifth Circuit's additional independent requirement, does not suggest that all nullification instructions are constitutionally infirm in all cases in which the defendant offers any mitigation evidence. The mitigating evidence must meet the nexus and scope requirements. Good character evidence would not usually meet the nexus requirement, whereas evidence of the defendant's age would not usually meet the scope requirement. These two requirements, without more, have been effective at limiting the application of *Penry I* to cases to which the Supreme Court's reasoning in *Penry I* applies.

For example, in *Richardson*, we found that Richardson made no evidentiary showing that either his alleged childhood experiences of poverty, parental neglect, illiteracy, and possessing a speech disorder, or the alleged fact that his mother taught him to shoplift, tended to excuse his capital crime. We stated that our conclusion might be different if Richardson had presented evidence that his mother had taught him to kill or commit other crimes of violence, or if his capital crime had begun as a robbery. Evidence of this nature might, from the viewpoint of society, tend to excuse the defendant's criminal behavior because the crime was caused in part by a personality that was damaged through no fault of his own.[20]

Applying *Penry I* to Smith's evidence

Unlike in *Richardson*, in this instance, the offense began as a robbery, and Smith's father had, if not taught his son to steal, modeled such behavior to the extent that Smith copied his father's behavior both at home and at school by taking things that did not belong to him. In addition to stealing, his father demonstrated on at least one occasion that it was acceptable behavior to threaten someone with bodily harm in an attempt to obtain another's property. Although the record does not reflect precisely when certain events occurred in his

[20] *Id.*

household, Smith was nineteen years old at the time of the offense, so there was not a substantial length of time separating his childhood experiences from his criminal behavior. In fact, he was still living with his mother. In short, the record contains evidence from which a rational jury could conclude that Smith's criminal conduct was in some way attributable to his unfortunate childhood experiences.[21] The jury, applying contemporary moral standards, could rationally have found Smith less morally culpable for his behavior than if he had not had such childhood experiences. I would therefore find Smith's evidence provided a sufficient nexus.

Under the first special issue, evidence of Smith's troubled childhood, if relevant at all without an additional definition of deliberately defined in terms of moral responsibility, would only be aggravating. The evidence may indicate that Smith acted deliberately, although perhaps unaware of the influence that his background had on his deliberations, in deciding to participate in the robbery and murder. Under the second special issue, the evidence, again, could only be aggravating. The evidence would indicate that Smith's unhappy background did in fact pervade his personality to such an extent that it continued to affect his behavior and choices, which the record reflects may have escalated in violence over the years. The jury could have determined that Smith's damaged personality could nevertheless be rehabilitated or that his behavior in response to his childhood was due in part to his youth or the proximity of his home-life experiences to the offense. However, if the jury determined that growing out of his youth would not remove the indelible influence of his childhood and he would therefore present a future and continuing danger to society and yet believed that the explanation for his behavior made the death penalty inappropriate, the jury could not have expressed this view through the special issues. Thus,

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[21] *See Richard v. State*, 842 S.W.2d 279, 283 (Tex. Crim.App.1992).

such evidence could not be given a mitigating effect by the jury's answers to the special issues, and Smith was entitled to an additional instruction providing the jury with a vehicle to give effect to his mitigating evidence.

The jury might have concluded, as the majority suggests, that evidence that Smith's behavior in school was often "exemplary" despite applicant's limitations and difficulties indicated that Smith could learn from his mistakes and evaluate the consequences of his actions. However, the jury may also have concluded that evidence that his often "exemplary" behavior was increasingly interrupted with disruptive and even criminal behavior, indicated that try as he might, Smith was not able, as hopefully people in general are able to do, to control his impulses and surmount and learn from his negative experiences. The jury did not need an expert witness to draw this reasonable conclusion from them.

Penry II's holding—unconstitutional nullification instruction

Unlike the majority, I do not find that the nullification instruction Smith received is significantly distinguishable from the one reviewed by the Supreme Court in *Penry II*. None of the differences between the instructions in *Penry II* and the instant case alter the fundamental aspects of the vehicle that was provided to the jury in an attempt to allow the jury to consider and give effect to the defendants' mitigating evidence. This vehicle, not merely the description of it, was at the heart of the Supreme Court's reasoning in determining that the instruction in *Penry II* was insufficient. The Supreme Court made this clear by assuming the jury could have understood that the instructions operated in the manner the State argued: by allowing the jury to change to a negative its answer to one of the special issues based on something other than what the question asked.[22] Therefore, providing the

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[22] *Penry II*, 532 U.S. at 798-99, 121 S.Ct. 1910.

same vehicle in more explicit terms does not overcome the defects identified in *Penry II*.

Additionally, the same contradiction between the verdict form and the supplemental instructions exists here as in *Penry II*.[23] The verdict form still contained only the language of the special issues. Even if the nullification instruction clearly trumped the instructions regarding how to answer the special issues, a juror could have reasonably believed that following the instructions would violate the juror's oath to render a true verdict. A juror believing this could have reasonably concluded that there was, therefore, no effective vehicle for expressing the view that Smith did not deserve a death sentence because of his mitigating evidence.

The majority focuses on the use of mandatory language used in Smith's instructions versus the permissive language used in the instructions given to Penry. Although I find mandatory language in Penry's instructions equivalent to that in Smith's, I find no merit in this argument because making it mandatory rather than permissive to return a false answer makes the answer no less false. Such an answer would be given in vio'ation of the juror's oath to render a true verdict, when the verdict form contained only the language of the statutory special issues.

Even if Smith's nullification instruction is more similar to the instruction in Robertson than to the one in *Penry II*, the Fifth Circuit did not determine that such a nullification instruction would be sufficient where *Penry I* evidence exists.[24] In its en banc opinion on rehearing, the Fifth Circuit reasoned that the nullification instruction was redundant in Robertson's case because it determined that the jury could give effect to the mitigating evidence within the scope of the

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[23] *Penry II*, 532 U.S. at 799, 121 S.Ct. 1910.

[24] *Robertson v. Cockrell*, 325 F.3d 243, 258 (5th Cir.2003), *cert. denied*, 539 U.S. 979, 124 S.Ct. 28, 156 L.Ed.2d 691 (2003).

special issues.[25] In the original panel opinion on remand, the Fifth Circuit did not determine whether Robertson was entitled to a *Penry* instruction; it found Robertson's instructions fell prey to the same defects the Supreme Court identified in *Penry II*. The statement in Robertson, quoted by the majority, does not support the majority's conclusion that a distinction in the wording of the instruction cured the defects identified in *Penry I*. That quote refers to the Fifth Circuit's reasoning that because the answers to the special issues would be the same regardless of the supplemental instruction where the mitigating evidence could be considered within the scope of the special issues, there would be no potential for contradiction and the jury would not be forced into the position of falsely answering "no" to the supplemental instructions.

It also does not follow that "if Robertson was not entitled to relief under *Penry II*, then applicant is not entitled to relief." Robertson was remanded to the Fifth Circuit by the Supreme Court after *Penry II* because *Penry II* is applicable to cases beyond Penry's. The Fifth Circuit had previously affirmed Robertson's death sentence based on the appropriateness of the nullification instruction. However, after *Penry II*, whether Robertson's nullification instruction was sufficient as to Robertson's evidence was called into question. We stayed Robertson's execution in light of our pending review of Smith.

I also note that while the Fifth Circuit said, in its en banc opinion in Robertson, that Texas trial courts "could not craft entirely new jury interrogatories, because the precise questions had been written by the state legislature,"[26] the same year that we approved of the trial courts' use of nullification instructions in Fuller, we also determined it was not error for trial courts to have submitted judicially-crafted jury inter-

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[25] *Robertson*, 325 F.3d at 257.

[26] *Robertson*, 325 F.3d at 248-49.

rogatories in an effort to comply with *Penry I*'s mandate.[27] There existed a reasonable likelihood that the jury, under oath to return a true verdict, applied the nullification instruction in a way that precluded them from giving effect to Smith's mitigating evidence.

Based on the Supreme Court's reasoning in *Penry II*, I would conclude that the nullification instruction Smith received would not be a sufficient vehicle, under *Penry I*, to allow the jury to give effect to the defendant's mitigating evidence relevant beyond the scope of the special issues.

Because the mitigating value of Smith's evidence could not be considered and given effect within the special issues and the jury was not provided with a sufficient vehicle for expressing its reasoned moral response to his evidence, the Texas capital punishment statute operated in an unconstitutional manner as applied to Smith. But for his failure to object to the nullification instructions at trial, Smith would be entitled to a new punishment hearing.

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[27] *State v. McPherson*, 851 S.W.2d 846, 850 (Tex. Crim.App.1992).

Opinion on a Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals
U.S. Supreme Court
Smith v. Texas, 543 U.S. 37 (2004)

SUPREME COURT OF THE UNITED STATES

No. 04-5323

LAROYCE LATHAIR SMITH,

v.

TEXAS.

Nov. 15, 2004

I

In 1991, petitioner was convicted of brutally murdering one of his former co-workers at a Taco Bell in Dallas County. The victim and one of her co-workers were closing down the restaurant when petitioner and several friends asked to be let in to use the telephone. The two employees recognized petitioner and let him in. Petitioner then told his former co-workers to leave because he wanted to rob the restaurant. When they did not leave, petitioner killed one co-worker by pistol-whipping her and shooting her in the back. Petitioner also threatened, but did not harm, his other former co-worker before exiting with his friends. The jury found petitioner guilty of capital murder beyond a reasonable doubt.

At the punishment phase, the jury was instructed on two special issues: first, whether the killing was deliberate; and second, whether the defendant posed a continuing danger to

others.[1] Approximately two years prior to the trial, we had held that presenting only these two special issues, without additional instructions regarding the jury's duty to consider mitigation evidence, violated the Eighth Amendment. *Penry v. Lynaugh,* 492 U. S. 302, 328, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) *(Penry I).* Shortly after petitioner's trial, the Texas Legislature amended its capital sentencing scheme to require juries to take "into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant" in deciding whether there are sufficient mitigating circumstances to warrant a sentence of life imprisonment rather than a death sentence. *Penry II, supra,* at 803, 121 S.Ct. 1910 (quoting Tex.Code Crim. Proc. Ann., Art. 37.071(2)(e)(1) (Vernon Supp.2001)). Petitioner, however, did not receive the benefit of the new statutory instruction at his trial. Instead, just as in *Penry II,* petitioner was sentenced pursuant to a supplemental instruction provided to the jury by the trial judge.[2] THAT INSTRUCTION Read:

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[1] The text of the special issues given to the jury was as follows: "(1) Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result? (2) Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" Pet.for Cert. 5.

[2] The supplemental instruction in *Penry II* stated:" 'You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating

"'You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.

"'In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death

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evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.'" 532 U.S., at 789-790, 121 S.Ct. 1910 (emphasis added).

sentence should be imposed despite the mitigating evidence, if any, admitted before you.

"'You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve.'" 132 S.W.3d, at 409.

Employing the framework of special issues modified by the supplemental nullification instruction, the jury considered a variety of mitigation evidence. Petitioner presented evidence that (1) he had been diagnosed with potentially organic learning disabilities and speech handicaps at an early age; (2) he had a verbal IQ score of 75 and a full IQ of 78 and, as a result, had been in special education classes throughout most of his time in school; (3) despite his low IQ and learning disabilities, his behavior at school was often exemplary; (4) his father was a drug addict who was involved with gang violence and other criminal activities, and regularly stole money from family members to support a drug addiction; and (5) he was only 19 when he committed the crime.

In response, the prosecution submitted evidence demonstrating that petitioner acted deliberately and cruelly. The prosecution emphasized that petitioner knew his victim, yet stabbed her repeatedly in numerous places on her body. With respect to petitioner's future dangerousness, the prosecution stressed that petitioner had previously been convicted of misdemeanor assault and proffered evidence suggesting that he had violated several drug laws.

During closing arguments at the punishment phase, the prosecution reminded the jury of its duty to answer truthfully the two special issues of deliberateness and future dangerousness.

> "Now, when we talked to you on voir dire, we talked to you about—and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, 'Mr. Nancarrow, Ms. McDaniel, if you prove to me that the answers to those special issues should be yes, then I can answer them yes.' If you wavered, if you hesitated one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now." Pet. for Cert. 6.

The jury verdict form tracked the final re minders the prosecution gave the jury. The form made no mention of nullification. Nor did it say anything about mitigation evidence. Instead, the verdict form asked whether petitioner committed the act deliberately and whether there was a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. The jury was allowed to give "Yes" or "No" answers only. The jury answered both questions "Yes" and sentenced petitioner to death. App. 4 to Pet. for Cert.

On direct appeal, petitioner argued that our holding in *Penry I* rendered his jury instructions unconstitutional because the special issues did not allow the jury to give effect to his mitigation evidence. The Texas Court of Criminal Appeals affirmed petitioner's sentence, reasoning that the nullification instruction provided an adequate vehicle through which the jury could consider petitioner's evidence. We denied certiorari on May 15, 1995. *Smith v. Texas*, 514 U.S. 1112, 115 S.Ct. 1967, 131 L.Ed.2d 857.

Petitioner filed an original writ of habeas corpus in the trial court in 1998. That suit was dismissed as untimely, but the Texas Legislature amended its criminal code in such a way as to allow petitioner to file a timely writ. Petitioner did so,

claiming that his jury was instructed in violation of the Eighth Amendment. Before the Texas Court of Criminal Appeals, petitioner argued that the jury instructions in his case ran afoul of our holding in *Penry II*. The court denied petitioner's application on the merits. 132 S.W.3d 407 (2004).[3]

II

The Texas Court of Criminal Appeals issued its opinion just prior to our decision in *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). In *Tennard*, we reversed the Fifth Circuit's refusal to grant a certificate of appealability (COA) to a defendant who was sentenced under the Texas capital sentencing scheme prior to the legislative revisions which took place in the aftermath of *Penry I*. Tennard, relying upon *Penry I*, argued that Texas' two special issues—deliberateness and future dangerousness—did not allow the jury to give effect to his mitigation evidence and that the trial court's failure to issue a supplemental mitigation instruction that would allow the jury to give full effect to his evidence rendered his death sentence unconstitutional. The state court and the Fifth Circuit both held that the lack of an adequate mitigation instruction was irrelevant. The courts both determined that Tennard had failed to satisfy the Fifth Circuit's threshold standard for "'constitutionally relevant' mitigating evidence, that is, evidence of a 'uniquely severe permanent handicap with which the defendant was burdened through no fault of his own,' and evidence that 'the criminal act was attributable to this severe permanent condition.'" 542 U.S., at 281, 124 S.Ct., at 2568 (some internal quotation marks omitted).

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[3] Four judges would have found petitioner's claim procedurally defaulted. See 132 S.W.3d, at 417 (Hervey, J., concurring); *id.*, at 428 (Holcomb, J., concurring). The majority of the court, however, declined to adopt this holding and reached petitioner's claims on the merits.

Our rejection of that threshold test was central to our decision to reverse in *Tennard*. We held that "[t]he Fifth Circuit's test has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evidence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment." *Id.*, at 284, 124 S.Ct., at 2570. Rather, we held that the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a "low threshold for relevance," which is satisfied by "'"evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value."'" *Id.*, at 284-285, 124 S.Ct., at 2570 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)).

The Texas Court of Criminal Appeals relied on precisely the same "screening test" we held constitutionally inadequate in *Tennard*. 132 S.W.3d, at 413 (holding that mitigation evidence requires a special instruction only when that evidence passes the threshold test of "whether the defendant's criminal act was 'due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own'" (quoting *Robertson v. Cockrell*, 325 F.3d 243, 251 (C.A.5 2003) (en banc)). Employing this test, the court concluded that petitioner's low IQ and placement in special-education classes were irrelevant because they did not demonstrate that he suffered from a "severe disability." 132 S.W.3d, at 414. But, as we explained in *Tennard*, "[e]vidence of significantly impaired intellectual functioning is obviously evidence that 'might serve as a basis for a sentence less than death.'" 542 U.S., at 288, 124 S.Ct., at 2572 (some internal quotation marks omitted) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)). There is no question that a jury might well have considered petitioner's IQ scores and history of participation in special-

education classes as a reason to impose a sentence more lenient than death. Indeed, we have held that a defendant's IQ score of 79, a score slightly higher than petitioner's, constitutes relevant mitigation evidence. See *Wiggins v. Smith*, 539 U.S. 510, 535, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); see also *Tennard, supra*, at 288, 124 S.Ct., at 2572-73).

The state court also held that petitioner had offered "no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder." 132 S.W.3d, at 414. We rejected the Fifth Circuit's "nexus" requirement in *Tennard, supra*, at 287, 124 S.Ct., at 2571-72 (noting that none of our prior opinions "suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered" and holding that the jury must be allowed the opportunity to consider *Penry* evidence even if the defendant cannot establish "a nexus to the crime").

That petitioner's evidence was relevant for mitigation purposes is plain under our precedents, even those predating *Tennard*. See, e.g., 492 U.S., at 319-322, 109 S.Ct. 2934; *Payne v. Tennessee*, 501 U.S. 808, 822, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991); *Boyde v. California*, 494 U.S. 370, 377-378, 110 S. Ct. 1190, 108 L.Ed.2d 316 (1990); *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982). *The state court, however, erroneously relied on a test we never countenanced and now have unequivocally rejected. We therefore hold that the state court "assessed [petitioner's legal] claim under an improper legal standard."* Tennard, supra, *at 287, 124 S.Ct., at 2572. Because petitioner's profered evidence was relevant, the Eighth Amendment required the trial court to empower the jury with a vehicle capable of giving effect to that evidence. Whether the "nullification instruction" satisfied that charge is the question to which we now turn.*

III

The Texas Court of Criminal Appeal sheld that even if petitioner did proffer relevant mitigation evidence, the supplemental "nullification instruction" provided to the jury adequately allowed the jury to give effect to that evidence. The court found it significant that the supplemental instruction in this case "told the jury that it 'shall' consider all mitigating evidence, even evidence unrelated to the special issues, [and] it also told the jury how to answer the special issues to give effect to that mitigation evidence." 132 S.W. 3d, at 416. The court also concluded that the nullification instruction made it clear to the jury that a "No" answer was required if it "believed that the death penalty was not warranted because of the mitigating circumstances." *Ibid.*

In *Penry II*, we held that "the key under *Penry I* is that the jury be able to 'consider and *give efect to* [a defendant's mitigation] evidence in imposing sentence.'" 532 U.S., at 797, 121 S.Ct. 1910 (quoting *Penry I, supra*, at 319, 109 S.Ct. 2934); see 532 U.S., at 797, 121 S.Ct. 1910 (quoting *Johnson v. Texas*, 509 U.S., at 381, 113 S.Ct. 2658 (O'CONNOR, J., dissenting) ("[A] sentencer [must] be allowed to give *full* consideration and *full* effect to mitigating circumstances" (emphasis in *Johnson*))). We explained at length why the supplemental instruction employed by the Texas courts did not provide the jury with an adequate vehicle for expressing a "reasoned moral response" to *all* of the evidence relevant to the defendant's culpability. 532 U.S., at 796, 121 S.Ct. 1910. Although there are some distinctions between the *Penry II* supplemental instruction and the instruction petitioner's jury received, those distinctions are constitutionally insignificant.

Penry II identified a broad and intractable problem—a problem that the state court ignored here–inherent in any requirement that the jury nullify special issues contained within a verdict form.

> "We generally presume that jurors follow their instructions. Here, however, it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry's mitigating evidence did not fit within the scope of the special issues, answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. And answering the special issues in the mode prescribed by the supplemental instruction necessarily meant ignoring the verdict form instructions. Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a "'true verdict.'"
>
> "The mechanism created by the supplemental instruction thus inserted 'an element of capriciousness' into the sentencing decision, 'making the jurors' power to avoid the death penalty dependent on their willingness' to elevate the supplemental instruction over the verdict form instructions. There is, at the very least, 'a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration' of Penry's mental retardation and childhood abuse. The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence." *Id.*, at 799-800, 121 S.Ct. 1910 (citations omitted).

It is certainly true that the mandatory aspect of the nullification instruction made petitioner's instruction distinct from Penry's. Indeed, the "shall" command in the nullification instruction resolved the ambiguity inherent in the *Penry II* instruction, which we held was either a nullification instruction or an instruction that "'shackled and confined'" Penry's mitigating evidence within the scope of the impermissibly narrow special issues. *Id.*, at 798, 121 S.Ct. 1910. That being

said, the clearer instruction given to petitioner's jury did not resolve the ethical problem described *supra*, at this page.[4] To the contrary, the mandatory language in the charge could possibly have intensified the dilemma faced by ethical jurors. Just as in *Penry II*, petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented.[5] Even if we were to assume that the jurors could easily and effectively

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[4] The concurring opinions below straightforwardly recognized this problem. See 132 S.W.3d 407, 427 (Tex.Crim.App.2004) (Hervey, J., concurring) (concluding that the "'nullification' instruction would, as a matter of federal constitutional law, suffer from the same defect as the one in *Penry II* had applicant presented any mitigating evidence that was beyond 'the effective reach of the sentence'" and conceding that the instruction given to petitioner may have been inadequate "as a matter of federal constitutional law"); *id.*, at 428 (Holcomb, J., concurring) ("The nullification instruction provided to Smith's jury contained the same defects the Supreme Court identified in *Penry II*. Therefore, the jury was unconstitutionally precluded from considering and giving effect to Smith's mitigating evidence").

[5] There is another similarity between this case and *Penry II*. In *Penry II*, we found it significant that the prosecutor admonished the jury to "'follow your oath, the evidence and the law'" prior to the deliberations in which the jury was required to fill out the verdict form. 532 U.S., at 802. We held that this statement sent the jury "mixed signals" and "only reminded the jurors that they had to answer the special issues dishonestly in order to give effect to Penry's mitigating evidence." *Ibid.* 121 S.Ct. 1910. The prosecutor here similarly reminded the jury that each and every one of them had promised to "follow the law" and return a "Yes" answer to the special issues so long as the State met its burden of proof. Pet. for Cert. 6. Thus, the nullification instruction presented the same ethical dilemma here and, what is more, it seems that despite the inclusion of the mandatory "shall" language, the nullification instruction may have been more confusing for the jury to implement in practice than the state court assumed.

have comprehended an orally delivered instruction directing them to disregard, in certain limited circumstances, a mandatory written instruction given at a later occasion, that would not change the fact that the "jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence." *Penry II*, 532 U.S. at 801, 121 S.Ct. 1910.

There is no principled distinction, for Eighth Amendment purposes, between the instruction given to petitioner's jury and the instruction in *Penry II*. Petitioner's evidence was relevant mitigation evidence for the jury under *Tennard* and *Penry I*. We therefore hold that the nullification instruction was constitutionally inadequate under *Penry II*. The judgment of the Texas Court of Criminal Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

I would affirm the judgment of the Texas Court of Criminal Appeals. See *Walton v. Arizona*, 497 U.S. 639, 673, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (SCALIA, J., concurring in part and concurring in the judgment).

State's Brief on Remand to the Texas Court of Criminal Appeals; *Ex parte LaRoyce Lathair Smith*, No. 74,228, Texas Court of Criminal Appeals (March 15, 2005)

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

No. 74,228

EX PARTE

LAROYCE LATHAIR SMITH,

Applicant,

On remand from the Supreme Court of the United States, Cause No. 04-5323, Reversing This Court's Judgment on Applicant's Petition for Writ of Habeas Corpus from Dallas County in Cause Number 74,228

STATE'S BRIEF ON REMAND

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TO THE HONORABLE COURT OF
CRIMINAL APPEALS:

Respondent, the State of Texas, submits this brief on remand.

STATEMENT OF THE CASE

LaRoyce Lathair Smith was convicted and sentenced to death on June 14, 1991 for the capital murder of Jennifer Soto. On. June 22, 1994, in an unpublished opinion, this Court affirmed his conviction on direct appeal. *Smith v. State*, No. 71,333, slip op. at 10 (Tex. Crim. App. June 22, 1994) (not designated for publication). The United States Supreme Court denied certiorari review. *Smith* v. *Texas*, 514 U.S. 1112 (1995). Applicant then filed his first application for writ of habeas corpus in state court, but it was dismissed as untimely on July 16, 1998. *Ex parte Smith*, 977 S.W.2d 610 (Tex. Crim. App, 1998). The Supreme Court again declined to issue a writ of certiorari. *Smith v. Texas*, 525 U.S. 1148 (1999). Applicant next filed a federal petition for habeas relief, but the United States District Court dismissed the proceeding without prejudice so that applicant could return to the Texas courts pursuant to newly enacted procedures for untimely habeas applications. *Smith v. Johnson*, No. 3:98-CV-1778 (N.D. Tex. 1999); TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4A (Vernon Supp. 2004-2005).

On March 17, 2000, applicant filed his second state application for writ of habeas corpus alleging, for the first time, jury charge error under *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Penny 1). While the application was pending, the Supreme Court issued *Penry II*. *Penry v. Johnson*, 532 U.S. 782 (2001). This Court accepted supplemental briefing and heard argument in light of *Penry*. On April 21, 2004, this Court issued its opinion denying habeas relief. *Ex parte Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004). Applicant again filed a petition for writ of certiorari in the United States

Supreme Court and, on November 15, 2004, the Supreme Court granted relief and reversed this Court's judgment. *Smith v. Texas*, 125 S.Ct. 400 (2004). This Court ordered the parties to file briefs on remand by March 11, 2005.

SUMMARY OF STATE'S ARGUMENT

I. This Court may, and should, apply the rule of procedural default to affirm applicant's death penalty sentence. Such a holding, based on applicant's failure to raise any objection to the punishment charge until nine years after his conviction, would be an independent and adequate state ground for denying relief.

II. This Court's opinion contained three alternative holdings that were independently sufficient to deny habeas relief: (1) applicant's mitigation evidence did not satisfy the *Tennard* screening test for *Penry* error, (2) applicant's mitigation evidence was not effectively beyond the reach of the special issues, and (3) the supplemental nullification instruction in this case was distinguishable from the instruction struck down in *Penry II*. The Supreme Court opinion reversed the first and third holdings, but did not address the second holding. Consequently, this Court may deny relief based on the extant holding that the two special issues in the charge provided the jury with a constitutionally sufficient vehicle to give effect to applicant's mitigating evidence.

ARGUMENT

I. Under Texas law, applicant's jury charge complaint may not be raised for the first time on habeas review.

In his second application for habeas relief, applicant claimed for the first time that the "nullification" instruction in the court's punishment charge violated *Penry I*. A majority of this Court disagreed with the merits of applicant's claim. Four justices in two concurring opinions concluded, however, that applicant had procedurally defaulted the claim by raising it

for the first time on habeas review. *Smith*, 132 S.W.3d at 423 (Hervey, J., concurring) and 428 (Holcomb, J., concurring).

In its per curiam opinion, the Supreme Court agreed with applicant, reversed the majority opinion, and remanded the case "in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above states [sic], as accord with right and justice, and the Constitution and Laws of the United States." The State urges this Court on remand to reconsider the issue of procedural default *as* an adequate and independent state ground upon which applicant's sentence may, and should, be affirmed. *See Kunkle v. Texas*, 125 S.Ct. 818, 2004 U.S. LEXIS 8274 (2004) (Stevens, J., concurring) (noting that, where the Texas Court of Criminal Appeals' decision is independently based on state procedural ground, Supreme Court lacks jurisdiction to review the matter). This Court previously has relied on procedural default to affirm a conviction on remand after the Supreme Court vacated a judgment by this Court affirming the conviction on direct appeal. *Saldano v. State*, 70 S.W.3d 873, 891 (Tex. Crina. App. 2002).

Applicant's habeas claim alleges that the punishment charge in this case violated the Eighth Amendment under the reasoning in Penry I. For cases tried before 1989, the year Penry I issued, such claims were not forfeited by the failure to object at trial. E.g. *Selvage v. Collins*, 816 S.W.2d 390, 391 (Tex. Crim. App. 1991); *Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991). This is not applicant's situation, however. Applicant was convicted in 1991, two years after Penry I issued. For constitutional rights recognized at the time of trial, the failure to object results in procedural default for purposes of both an appeal and a habeas writ application. See *Garcia v. State*, 887 S.W.2d 846, 861 (Tex. Crim. App. 1994); *Ex parte Dutchover*, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989).

The constitutional nature of applicant's complaint does not bar the application of the procedural default rule. Under Texas case law, Eighth Amendment claims may be defaulted by the failure to object at trial. *See Buxton v. Collins*, 925 F.2d 816, 821-22 (5th Cir. 1991) (concluding that petitioner's failure to object to jury charge procedurally defaulted his Eighth Amendment *claim* that jury was prevented from giving mitigating effect to evidence that he was non-shooter); *Ex parte Davis*, 866 S.W.2d 234, 238 (Tex. Crim. App. 1993) (concluding that applicant forfeited his Eighth Amendment claim by failing to object to the prosecutor's remarks during voir dire and punishment argument). Likewise, complaints regarding defense-oriented jury instructions may not be raised for the first time on appeal. *See Pondexter v. State*, 942 S.W.2d 577, 588 (Tex. Crim. App. 1996) (plurality op.) (concluding Pondexter waived his complaint regarding an instruction that the jury answer the first special issue affirmatively if they believed the mitigating evidence militated in favor of a life sentence); *Posey v. State*, 966 S.W.2d 57, 61 (Tex. Crim. App. 1998) (holding that code of criminal procedure article 36.14 mandates an objection to claimed errors of commission and omission in jury charge).

In the trial of this case, applicant filed a pretrial motion entitled "Motion to Reveal Mitigation Charge." (CR: 87, attached to this brief as Exhibit A). In the motion, defense counsel acknowledged the uncertain state of the law after *Penry I* and revealed that he anticipated presenting *Penry* evidence at trial. Defense counsel asked to *see* the court's charge on mitigation evidence prior to the commencement of voir dire. The trial judge granted this request. Prior to the commencement of voir dire, the trial judge confirmed that defense counsel had received a copy of the mitigation charge, as requested. (RR6; 3, record excerpt attached to this brief as Exhibit B). The court then told defense counsel:

> If you see something in that charge that you'd like worded differently or you think could be made clearer or

> better, I'm always willing to entertain different wording or different ways of putting the idea. So if you come up with something you like better, just let me know and I'll look at it.

(RR6: 3-4).

Despite the trial court's invitation, counsel made no objections or changes to the mitigation (nullification) charge. Voir dire commenced. As noted in Judge Hervey's concurring opinion in this case, all the prospective jurors who ultimately served on the jury were carefully questioned as to whether they understood and could apply the nullification charge if the case went to punishment. *See infra* notes 2, 3, and 4; *Smith,* 132 S.W.3d at 420 (Hervey, J., concurring). During the punishment charge conference, defense counsel made lengthy objections to the charge, *none* of which involved the nullification instruction. (RR32: 155-67) (record excerpt attached as Exhibit C to this brief). Applicant filed a motion for new trial and an amended motion for new trial, neither of which contained any jury charge complaint. (CR: 126, 127). So applicant not only failed to lodge a trial objection to the nullification instruction of which he now complains, but he declined the trial judge's specific invitation to do so.

Nor did applicant raise the issue on direct appeal. In his sixth point of error, applicant challenged a pretrial ruling made by the trial court rejecting applicant's claim that code of criminal procedure art. 37.071 was unconstitutional in that it provided no effective vehicle for a jury to apply mitigating evidence. Thus, applicant's complaint on direct appeal was a statutory one. He did not complain about, or even mention, the court's charge, presumably because be believed that the nullification instruction cured the *Penry* problem or the issue had not been preserved for appellate review. *See* Exhibit I. (excerpt from defense brief on direct appeal). And, incidentally, applicant's first application for writ of habeas corpus, which was dismissed as untimely, likewise contained

no complaint about the nullification charge. *See* Exhibit E (excerpt from first writ application).

Nine years after applicant declined the trial judge's invitation to object to the nullification charge, he challenged that charge for the first time on habeas review. He presents no justification for having waited so long, and the delay serves only to frustrate society's interest in the prompt administration of justice. There is no doubt that applicant's attorney was aware of the issue at trial, and by all accounts, approved of the charge. The fact that *Penry II* had not yet issued is inconsequential: *Penry II* was not new law but only reiterated the holding in *Penry I*. *See Robertson v. Cockrell*, 325 F.3d 243, 255 (5th Cir.) (en banc), *cert. denied*, 539 U.S. 979 (2003). Moreover, as Judge Hervey's concurring opinion points out, applicant's second habeas application raising the nullification charge complaint did predate *Penry II*, so the issuance date of *Penry II* was necessarily inconsequential to applicant's ability to challenge the nullification instruction. *Smith*, 132 S.W.3d at 424 (Hervey, J., concurring).

Applicant has procedurally defaulted this claim under Texas law because he did not raise any objection to the charge at trial or on appeal. *See Smith*, 132 S.W.3d at 424 (Hervey, J., concurring) and 428 (Holcomb, J., concurring); *Ex parte Pena*, 71 S.W.3d 336, 338 (Tex. Crim. App. 2002) (holding that even if Pena alleged a constitutional or jurisdictional defect, he would not be entitled to habeas corpus relief because he could have, and should have, complained about a fine at the time it was imposed or on direct appeal); *see also Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001) (writ of habeas corpus may not be used to litigate matters that should have been raised on direct appeal).

The highest court of a state is the final arbiter of what is state law, and its pronouncement is to be accepted by federal courts as defining state law. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (U.S. 1940). The Supreme Court will

not review a decision by a state's highest court if it rests on a state law ground independent and adequate by itself to support the result. *Dretke v. Haley*, 124 S.Ct. 1847, 1851-52 (2004). In certain exceptional cases, such as where application of the procedural rule would serve no perceivable state interest, the subsequent federal claim is not barred. *See Lee v. Kemna*, 534 U.S. 362, 376-378 (2002).[1]

A decision in this case based on procedural default would not be a meaningless application of form over substance. It would further the State's important interest in ensuring that "counsel do their part in preventing trial courts from providing juries with erroneous instructions." *Osborne v. Ohio*, 495 U.S. 103, 123 (1990); *see also Fuentes v. Dretke*, 89 Fed. Appx. 868, 874 (5th Cir. 1999) (not designated for publication) (holding that Texas's requirement that a request for a jury instruction be on the record or in writing is not a meaningless ritual). Particularly where, *as* here, defense counsel declines the trial court's invitation to object to or amend the charge, a reversal of the conviction at this late date makes a mockery of the contemporaneous objection rule, and it encourages the use of piecemeal and delayed litigation to prevent the finality of convictions.

Moreover, any prejudice to applicant caused by the application of procedural default in this case is fictive. The Supreme Court held that the mandatory aspect of the trial court's nullification charge instructing the jury to elevate the

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[1] Also, in the death penalty context, a narrow exception exists to allow federal courts to hear defaulted claims only if the individual defendant shows he is "actually innocent" of the sentence he received. *See Sawyer v. Whitley*, 505 U.S. 333, 339-340 (1992). Under this burden, a defendant must show by clear and convincing evidence that but for constitutional error at his hearing, no reasonable juror would have found him *eligible* for the death penalty. *Id.* at 350. As a general rule, claims like applicant's that are based on the jury's failure to receive mitigation evidence do not satisfy this test. *Id.* at 348-349.

mitigation issue over the other two special issues in the verdict form—while resolving the ambiguity inherent in the *Penry II* instruction—"possibly intensified the dilemma faced by ethical jurors" to render true answers on the verdict form. *Smith*, 125 S.Ct. at 407. The Supreme Court further stated that the nullification instruction may have been more confusing for the jury to implement in practice than this Court assumed. *Id.* at 407, n.5.

In fact, this Court did not have to assume anything about how the jurors implemented the instruction. Each and every person who served on the jury in this case was told that a death sentence required "yes" answers to all of the special issues and that any one "no" answer would result in a life sentence.[2] The lawyers and the court went to great lengths at voir dire to explain the nullification instruction to the jurors, calling it an "escape valve" for giving the defendant a life sentence and providing examples of the type of mitigating evidence it contemplated, such as mental retardation, mental illness, an abusive childhood, or a drug or alcohol problem.[3] Each and every person who served on the jury in this case stated he understood the mitigation charge and would change a "yes" answer to "no" if the mitigation evidence warranted a life sentence.[4] Thus, the jurors knew *exactly* how to give a

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[2] *See* RR6: 117-18 (Gary Powell, Juror No. 1); RR8: 102 (Ava Meyer, Turor No. 2); RR10: 106 (Donna Coulter, Juror No. 3); RR11: 48 (Carol Keyte, Juror No. 4); RRl 1: 141, 160-61 (Thomas Morrison, Juror No. 5); RR13: 31-32 (Dottie Wright, Juror No. 6); RR15: 7 (Teresa lane, Juror No. 7); RR16: 5 (Steven Dillow, Juror No. 8); RR16: 65 (Janis Zeigler, Juror No. 9); RR20: 176 (Lynn Bartholomew, Juror No. 10); RR21: 43 (Mary Foote, Juror No. 11); RR25: 99 (Derek Fisher, Juror No. 12).

[3] *See, e.g.*, RR8: 129-30; R11.10: 117, 131; RR-11: 161-62; RR13: 65; P.R.15: 20-21; R16: 17, 70-71; RR20: 187-88; RR21: 53; RR25: 105-06.

[4] See RR6: 149-53 (Gary Powell, Juror No. 1); RR8: 112-13, 133-34 (Ava Meyer, Juror No. 2); RR10; 118, 136-37 (Donna Coulter, Juror No. 3); RR11:60 (Carol Keyte, Juror No. 4); RR11: 162-65 (Thomas Morrison, Juror No. 5RR13: 66-67 (Dottie Wright, Juror No. 6); RR15: 31-32

life sentence to applicant if they had wanted to do so, and they all agreed they would do it under the appropriate circumstances.

The Supreme Court also relied on the State's jury argument to support its conclusion that the jury was confused about how to apply the mitigation instruction, condemning the prosecutor's comments that the jury "follow the law" and return a "Yes" answer to the special issues so long as the State met its burden of proof. *Smith,* 125 S.Ct. at 407, n.5. But if it is appropriate to consider the prosecutor's argument in this matter, then it is no less appropriate to consider defense counsel's argument. In this case, defense counsel told the jury:

> I want to talk to you about mitigating evidence. Mitigating evidence is that evidence that reduces the defendant's personal or moral culpability and may include, but is not limited to, any aspect of his character, record, background, or circumstances of the offense. It may go to one of the special issues, it may not, but the Court tells you—and that the State has a burden—that if you think that he should not die, you are to put "no" in one of the spaces . . . .
>
> (RR33: 55-56).

Defense counsel then listed the mitigation evidence for the jury to consider, including applicant's low intellect and difficult family life. (RR33: 56-58). Defense counsel reminded the jury that the State had to prove beyond a reasonable doubt that the death sentence should be imposed despite mitigation evidence and said, "You *shall* answer 'no' to one of the issues to give effect to your meaning." (RR33: 69) (emphasis

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(Teresa Lane, Juror No. 7); RR16: 18-19 (Steven Dillow, Juror No. 8); RR16: 70-71 (Janis Zeigler, Juror No. 9); RR20: 187-89, 204-06 (Lynn Bartholomew, Juror No. 10); RR21: 53-54 (Mary Foote, Juror No. 11); RR25: 105-07 (Derek Fisher, Juror No. 12).

added). Thus, if the State's argument confused the jury, defense counsel's closing comments reminded the jury *exactly* how to give mitigating effect to the mitigation evidence listed in the Supreme Court's per curiam opinion.

Therefore, the theoretical concern expressed by the Supreme Court over nullification charges in general is unwarranted in this particular case. There is simply no basis for the belief that, despite their commitment during voir dire examination to use the instruction, and despite defense counsel's careful reminders of how to give effect to the mitigating evidence during closing argument, any of the jurors nevertheless ignored the instruction out of an ethical quandary to follow their oath to render a "true verdict" in answering the special issues. In fact, defense counsel told one juror specifically that, in following the mitigation instruction, "You're not cheating or not giving a true verdict, you're following the Court's law or the Court's rules." (RR15: 32).

For the foregoing reasons, a decision by this Court holding that applicant is procedurally barred from complaining about a charge he apparently endorsed at 'trial would be an independent and adequate state ground upon which applicant's conviction could and should be properly affirmed. *See Dretke*, 124 set at 1852 (citing *Sawyer*, 505 U.S. at 336).

II. The Supreme Court's decision did not affect this Court's holding that the jury charge, irrespective of the nullification instruction, was a sufficient vehicle for the jury to give effect to applicant's mitigation evidence.

Only the United States Supreme Court has authority to review judgments rendered by a state's highest court on claims of federal constitutional rights. See 28 U.S.C. § 1257(a) (West 1993); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923). Until the Supreme Court reviews a holding of the state's highest court on a federal issue, that state court

ruling, right or wrong, 'will stand. *See Rooker*, 263 U.S. at 415 (holding that a wrong decision by a State Supreme Court is not void but an effective and conclusive adjudication, left open to reversal or modification in an appropriate appellate proceeding before the United States Supreme Court).

Judge Cochran's majority opinion in this writ proceeding contained three alternative holdings that were independently sufficient to deny relief. The majority first concluded that (1) applicant did not show evidence of a severe and permanent handicap, not of his own making, which is at least related to the offense (the *Tennard* "screening test"), (2) applicant did not show that the disability evidence was beyond the reach of the two special issues, deliberateness and future dangerousness, and (3) the nullification instruction in. this case was a more capacious vehicle than was constitutionally warranted. *See Smith,* 132 S.W.3d at 41516, 417.

In its per curiam opinion, the Supreme Court first held that this Court erroneously relied on the *Tennard* screening test, which had limited the application of *Penry I* to cases where the evidence linked the offense to a severe and permanent handicap not of the defendant's own making. The Supreme Court concluded that applicant's mitigation evidence properly met the "low threshold for relevance" that is required by Supreme Court precedents. *Smith*, 125 S.Ct. at 404-05. Then, without deciding whether the two special issues were sufficient vehicles for the jury to give effect to applicant's mitigating evidence, the Supreme Court skipped to the question of whether the nullification instruction in this case could overcome the problems of the *Penry* nullification instruction. *Id. at* 405.[5] Concluding there was no principled

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[5] This omission in the Supreme Court's analysis is evident in the following transition found at the end of section If of the opinion: Because petitioner's proffered evidence was relevant, the Eighth Amendment required the trial court to empower the jury with a vehicle capable of giving effect to that evidence. Whether the "nullification instruction" satisfied

distinction between the two instructions, the Court held that the "nullification instruction was constitutionally inadequate wider *Penry II*" *Id.* at 407. Thus, the Supreme Court's opinion did not purport to affect this Court's holding that applicant's mitigating evidence was not beyond the reach of the first two special issues. *Smith,* 132 S.W.3d at 412-413. Stated another way, the Supreme Court found no *Penry I* error.

The Supreme Court has never held that the Texas death penalty statute prior to 1991, with its two special issues, is unconstitutional in every case, regardless of the quantity or quality of the mitigating evidence. *See Smith,* 132 S.W.3d at 413; *Lackey v. State,* 816 8.W.2d 392 (Tex. Crim. App. 1991) (concluding that *Jurek v. Texas*, 428 U.S. 262 (1976) affirmed the constitutionality of the Texas special issue practice, and *Penry* did not overrule that holding). And the Supreme Court made no such holding in this case. In scrapping the *Tennard* screening test, the Supreme Court did not hold that *all* mitigating evidence now required supplemental mitigation instructions beyond the statutory special issues. *Smith,* 125 S.Ct. at 404-405. Consequently, this Court's holding that the special issues were a sufficient vehicle for the jury to give effect to applicant's mitigation evidence remains a viable conclusion under the law and facts.

Furthermore, the Supreme Court certainly did not hold that the existence of a nullification instruction in a charge is error per se in every case. A nullification charge is simply an inadequate vehicle to correct the problem noted in *Penry I.* But neither this Court, nor the Supreme Court, has found *Penry I* error in this case.

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that charge is the question to which we now turn." *Smith,* 125 S.Ct at 405. The question that *should* have been next considered by the Court was whether the statutory special issues satisfied that Eighth. Amendment requirement.

Therefore, the majority's second holding still stands: Applicant's evidence of mental limitations was relevant to whether he acted deliberately. *Smith*, 132 S.W.3d at 414-415. Stated another way, a juror could have given mitigating effect to the evidence of applicant's mental limitations by concluding that the limitations prevented him from acting deliberately. Also, evidence of applicant's learning disability and troubled background were relevant to whether he would constitute a future danger to society. *Id.* That is, a juror could give mitigating effect to applicant's evidence of a learning disability and troubled background by concluding that, if these factors caused his criminal behavior, most people commonly rise above such circumstances, and applicant therefore would probably not commit further acts of criminal violence in the future.

Nothing in the Supreme Court opinion requires this Court to reverse these holdings. The Supreme Court's opinion focused solely on the *Tennard* screening test and the viability of the supplemental nullification instruction under *Penry II*.[6] The Supreme Court did not in any way address the adequacy of the remainder of the jury charge in light of applicant's mitigation evidence. Thus, this Court should deny relief on the ground that the jury charge, irrespective of the supplemental mitigation instruction, was a sufficient vehicle for the jury to give effect to applicant's mitigation evidence. Right or wrong, this holding is the law of this case unless and until the Supreme Court states otherwise. *See Rooker*, 263 U.S. at 415.

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[6] This then begs the question, what did the Supreme Court intend to accomplish with its opinion in this case? Obviously, the Supreme Court had to address the Tennard test, because its opinion reversing *Tennard* issued after this Court issued its opinion relying on Tennard. Beyond this, the State suggests that the Supreme Court was merely making a statement about *all* nullification charges that, in its opinion, Texas should have but did not deduce from *Penry II*.

PRAYER

The State prays that this Honorable Court will conclude applicant has procedurally defaulted his jury charge complaint or, in the alternative, hold that the jury charge, absent the nullification instruction, was a sufficient vehicle for the jury to give effect to applicant's mitigation evidence, and deny the relief requested by applicant.

Respectfully submitted,

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State's Reply Brief on Remand to the Texas Court of Criminal Appeals; *Ex parte LaRoyce Lathair Smith*, No. 74,228, Texas Court of Criminal Appeals (March 29, 2005)

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

[Filed MAR 29, 2005]

No. 74, 228

EX PARTE
LAROYCE LATHAIR SMITH,
Applicant

On Remand from the Supreme Court of the United States, Cause No. 04-5323, Reversing This Court's Judgment on Applicant's Petition for Writ of Habeas Corpus from Dallas County in Cause Number 74,228

STATE'S REPLY BRIEF ON REMAND

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Respondent, the State of Texas, submits this brief on remand, in reply to the brief on remand filed by applicant, Laroyce Lathair Smith.

SUMMARY OF STATE'S ARGUMENT

Contrary to applicant's argument on remand, the *Penry II* error found by the Supreme Court in this case is harmless. In the event this Court rejects the arguments presented in the State's brief on remand (that applicant has procedurally defaulted this claim and that the Supreme Court's opinion did not purport to overrule this Court's conclusion that no *Penry I* error occurred), the State asks that this Court deny relief on the ground that the error is harmless.

ARGUMENT

The Nullification Instruction in This Case Did Not Harm Applicant

In his brief on remand, applicant asserts that *Penry II* error, such as that found by the Supreme Court in this case, is structural error not subject to a harmless error analysis. The State disagrees.

In *Fierro v. State*, this Court clarified that on habeas corpus review certain types of federal constitutional errors, deemed "nonstructural," are subject to a harmless error analysis; for those types of errors, it is the applicant's burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment. *Fierro v. State*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1991); *see also Penry v. Johnson*, 532 U.S. 782, 785 (2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)) (holding that habeas relief is warranted only if the constitutional error at issue is structural error or had a "substantial or injurious" effect on the verdict). Structural error, which is not subject to a harmless error

analysis, is error that permeates "the entire conduct of the trial from beginning to end" or "*affects the framework within which the trial proceeds.*" *See Arizona v. Fulminante*, *499 U.S.* 279, 309-310 (1991).

The United States Supreme Court has not said whether Penry error is subject to a harmless error analysis. Likewise, the State has found no definitive opinions from this Court or the Fifth Circuit on the matter.[1] In 1991, in a concurring opinion in *Ex parte Goodman*, Judge Clinton noted that there were "some indications" that the Supreme Court would consider a harm analysis appropriate to *Penry* claims, *Ex parte Goodman*, 816 S.W.2d 383, 388 (Tex. Crim. App. 1991).

As recently as March 22, 2005, three judges on the United States Supreme Court confirmed Judge Clinton's belief. In *Brown v. Payton*, the Supreme Court considered whether a California trial court violated Payton's Eighth Amendment rights to have the jury consider all the mitigation evidence he presented at his capital murder trial. *Brown v. Payton*, No. 03-1039, 2005 U.S. LEXIS 2753, *6-7 (Mar. 22, 2005) (not yet reported). The alleged errors were that the written jury instructions did not make it clear that the jury could consider evidence of Payton's postcrime religious conversion and that the prosecutor was allowed to urge this erroneous interpretation during jury argument. *Payton*, slip op. at *6-7.

In a plurality opinion, the majority found no "Penry-type" error in the case after considering the written charge and context of the trial as a whole. *Payton*, slip op. at *18-25. In a dissenting opinion, Justices Souter, Stevens, and Ginsburg

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[1] *But see Bigby v. Dretke*, No. 99-11262, 2005 U.S. App. Lexis 3815 (5th Cir. Mar. 8, 2005) (not yet reported) (reversing, vacating sentence, and remanding to district court for entry of order setting aside sentence, without conducting harm analysis, after finding *Penry II* error); *Hernandez v. Johnson*, 248 F.3d 344, 379-80 (5th Cir. 2001) (Dennis, J., dissenting) (stating that *Penry* error is structural defect defying harmless error analysis).

disagreed. They stated, "The failure of the State to provide Payton with a process for sentencing that respected his clearly established right to consideration of all mitigating evidence is plain at every step of the jury's instruction." *Payton*, slip op. at *42 (Souter, J., dissenting). The dissent went on to conclude that the error was "surely substantial and injurious" and therefore not harmless under the federal harmless error standard in *Brecht*, 507 S.W.2d at 638.

The *Payton* opinions suggest two things. One, allegations of "*Penry*-type" charge error are to be considered in light of the context of the whole jury trial because "jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Payton*, slip op. at *19-20 (citing *Boyde v. California*, 494 U.S. 370, 380-381 (1990)). The jury's understanding of particular instructions "may be thrashed out in the deliberative process, with commonsense understanding of the instructions in light of all that has taken place at the trial likely to prevail over technical hairsplitting." *Id.* at *20. Second, "*Penry*-type" charge errors are subject to a harmless error analysis. *See also Calderon v. Coleman*, 525 U.S. 141, 144, 146 (1998) (holding that jury charge error which potentially prevented the jury's consideration of constitutionally relevant mitigation evidence was subject to federal harmless error review under *Brecht*). Like the California death penalty scheme, the Texas death penalty scheme should be subject to a harmless error review.

Applicant argues in his brief on remand that a *Penry* violation is structural, not trial, error because it does not involve error in the admission of evidence, but concerns a broad and intractable problem in the jury's verdict form. Applicant also points out that no court has conducted a harm analysis after a finding of *Penry* error and that a reviewing court could not possibly gauge the effect of such an error on the jury without speculating.

Contrary to applicant's assertions, jury charge error in Texas is considered trial error, subject to a harmless error analysis. *See* TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon Supp. 2004-2005) ("Review of Charge on Appeal"); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). When trial error is presented on habeas review, it is subject to the harmless error standard set out in *Fierro*, 934 S.W.2d at 374-375. The application of the harmless error rule is further supported by the fact that *Penry claims are* subject to rules of procedural default, as discussed in the State's original brief on remand. *See also Mann v. Scott*, 41 F.3d 968, 979 (5th Cir. 1994) (holding that a *Penry* claim is procedurally barred if the defendant did not actually proffer the mitigating evidence at trial).

The State agrees with applicant that the federal and state case law is not populated with harmless error reviews on *Penry* claims. But this may be because many of the early *Penry* cases deal with *Penry I* error, rather than *Penry II* error, and the courts, like applicant, have equated the error described in *Penry I* as the harm itself. That is, *Penry I* error is the jury's inability, given the pre-1991 statutory special issues, to consider the mitigating aspect of all of the defendant's mitigation evidence. In such a case, the attendant harm would be that same inability of the jury to consider the mitigating aspect of all the defendant's evidence. But *Penry II* error is the inability of a "nullification instruction" to correct the error described in *Penry I* because of the instruction's ambiguous nature and ethical ramifications. As such, if the ambiguity and ethical problems are otherwise cured in the record, a nullification instruction could operate to allow the jury to give proper mitigating effect to the defendant's evidence, and any error would therefore be harmless. That is the situation in this case.

Furthermore, as noted above, *Penry*-type claims under the California death-penalty statute regularly are subjected to a

harmless error review. *Payton*, slip op. *58 (Souter, J., dissenting); *Coleman*, 525 U.S. at 146-147. And while many trials might not have a record capable of showing harmlessness, this case is a perfect example of how *Penry II* error can, in fact, be amenable to such review.

Viewing the charge error in this case in light of the whole trial, and more particularly, the voir dire examination, applicant has not met his burden on state habeas review to prove by a preponderance of the evidence that the *Penry II* error contributed to his conviction or punishment. *Fierro*, 934 S.W.2d 372. As noted previously by the State, each and every person who served on the jury in this case was told that a death sentence required "yes" answers to all of the special issues and that any one "no" answer would result in a life sentence.[2] The lawyers and the court went to great lengths at voir dire to explain the nullification instruction to the jurors, calling it an "escape valve" for giving the defendant a life sentence and providing examples of the type of mitigating evidence it contemplated, such as mental retardation, mental illness, an abusive childhood, or a drug or alcohol problem.[3] *Each and every person who served on the jury in this case stated they understood how to use the mitigation charge and would change a 'Yes" answer to "no" if the mitigation evidence warranted a life sentence.*[4] Thus, the jurors knew

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[2] *See* RR6: 117-18 (Gary Powell, Juror No. 1); RR8: 102 (Ava Meyer, Juror No. 2); RRIO: 106 (Donna Coulter, Juror No. 3); RR11: 48 (Carol Keyte, Juror No. 4); RR11: 141, 160-61 (Thomas Morrison, Juror No. 5); RR13: 31-32 (Dottie Wright, Juror No. 6); RR15: 7 (Teresa lane, Juror No. 7); RR16: 5 (Steven Dillow, Juror No. 8); RR16: 65 (Janis Zeigler, Juror No. 9); RR20: 176 (Lynn Bartholomew, Juror No. 10); RR21: 43 (Mary Foote, Juror No. 11); RR25: 99 (Derek Fisher, Juror No. 12).

[3] *See, e.g.*, RR8: 129-30; RRI0: 117, 131; RR11: 161-62; RR13: 65; RR15: 20-21; R16: 17, 70-71; RR20: 187-88; RR21: 53; RR25: 105-06.

[4] *See* RR6: 149-53 (Gary Powell, Juror No. 1); RR8: 112-13, 133-34 (Ava Meyer, Juror No. 2); RR10: 118, 136-37 (Donna Coulter, Juror No. 3); RR11: 60 (Carol Keyte, Juror No. *4);* RR11: 162-65 (Thomas

exactly how to give a life sentence to applicant if they had wanted to do so, and they all agreed they would do it under the appropriate circumstances.

Furthermore, in his closing argument, defense counsel reminded the jury:

> I want to talk to you about mitigating evidence. Mitigating evidence is that evidence that reduces the defendant's personal or moral culpability and may include, but is not limited to, any aspect of his character, record, background, or circumstances of the offense. It may go to one of the special issues, it may not, but the Court tells you and that the State has a burden—*that if you think that he should not die, you are to put "no" in one of the spaces* . . . .

(RR33: 55-56) (emphasis added). Defense counsel then identified the mitigation evidence for the jury's consideration, specifically, the evidence of applicant's low intellect and difficult family life that was of special concern to the United States Supreme Court. (RR33: 56-58); *Smith v. Texas*, 125 S.Ct. 400, 403 (2004). Defense counsel later reminded the jury that the State had to prove beyond a reasonable doubt that the death sentence should be imposed despite mitigation evidence and said, "You *shall* answer 'no' to one of the issues to give effect to your meaning." (RR33: 69) (emphasis added). Thus, defense counsel's closing comments reminded the jury exactly how to give mitigating effect to the precise mitigation evidence listed in the Supreme Court's per curiam opinion.

Morrison, Juror No. 5); RR13: 66-67 (Dottie Wright, Juror No. 6); RR15: 31-32 (Teresa Lane, Juror No. 7); RR16: 18-19 (Steven Dillow, Juror No. 8); RR16: 70-71 (Janis Zeigler, Juror No. 9); RR20: 187-89, 204-06 (Lynn Bartholomew, Juror No. 10); RR21: 53-54 (Mary Foote, Juror No. 11); RR25: 105-07 (Derek Fisher, Juror No. 12).

Accordingly, as noted in the State's original brief on remand, the theoretical concern expressed by the Supreme Court over nullification charges in general is unwarranted in this particular case. The record supports the conclusion that each and every juror knew how to give a life sentence and would have given a life sentence if they believed applicant's mitigation evidence warranted one. In fact, defense counsel told one juror specifically that, in following the mitigation instruction, "You're not cheating or not giving a true verdict, you're following the Court's law or the Court's rules." (RR15: 32).

The State does not dispute that the nullification instruction was unusual in that it told jurors to change a true "yes" answer to a false "no" answer on the verdict form if they believed that applicant deserved a life sentence. But while such an instruction may present a conundrum for legal minds, it certainly is not beyond the commonsense understanding of average jurors who do not "sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Payton*, slip op. at *20.

True, a juror uninformed about how to use the nullification instruction might be confused about it, but that is not the situation in this case. The jurors were educated about the "escape valve" for mitigation evidence, and all agreed they could use it. If, as applicant contends, a nullification charge makes the jurors' power to avoid the death penalty dependent on their willingness to elevate the supplemental instruction over the verdict form, then the jurors in this case indicated just such a willingness. In fact, it seems reasonable to conclude that the jury in this case probably gave *extra* consideration to applicant's mitigation evidence precisely because the mitigation instruction was somewhat out of the ordinary and was overemphasized by the parties and the trial court. The harm alleged by applicant in his case is a legal fiction based on a technical reading of the jury charge rather

than a review of the trial as a whole. There is no basis in this record to conclude that the jury did not know how to give, or would not have given, a life sentence if they believed applicant's mitigation evidence warranted one.

In fact, given the evidence at punishment, it is a reasonable conclusion that the jury, upon considering applicant's mitigation evidence, simply found it did not warrant a life sentence. By the time the punishment stage of trial began, the jury had already found applicant guilty of the torture and murder of an ex-coworker, a young woman of whose friendship he took advantage to gain entrance into the Taco Bell restaurant after business hours.[5] (RR27: 139). At punishment, the State presented evidence that applicant had previously been convicted of the aggravated assault of a young man by breaking a bat over his head and pointing a gun at him. (RR31: 25-32). While on bond and facing charges for the assault, applicant was arrested in possession of ten, individually packaged rocks of crack cocaine, worth about $100. (RR31: 121-23, 133, 137, 143-44, 149-51). The State also presented evidence of applicant's bad reputation and serious discipline problems while in school. On one occasion, he stole the rims and tires off a teacher's car, put them on his own car, pulled up outside the window of the teacher's classroom, and honked his horn so the teacher could see. (RR31: 169). Another teacher described applicant as a "portent of evil" and "big time problem." (RR32: 143, 144).

Applicant's case for mitigation, on the other hand, focused on his purported good character, not his limited mental ability or difficult family life. Of the nineteen defense witnesses presented, only one (Alberta Pringle) testified about appli-

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[5] Evidence showed that, in applicant's efforts to persuade the victim to open the store safe, he inflicted an "inhuman" pistol-whipping; a contact gunshot wound to the back; a stab wound to the neck; stab wounds to the face, scalp, abdomen, and thigh; and torture wounds just below her left breast. (RR27: 69-83, 150-51).

cant's special education history, and only one (applicant's brother, Myron Wilson) testified about his father's crack habit. (RR32: 14-43, 89-91). This entailed approximately 33 pages in the record. Two other witnesses briefly confirmed the father's drug habit, (RR32: 93, 113), and applicant's mother mentioned in passing that applicant was a "slow learner." (RR32: 125). Otherwise, the remaining 107 pages of defense testimony focused on applicant's character. In fact, contrary to the evidence of his limited mental ability, applicant's fiance testified that he has above-average intelligence, (RR32: 74), and the fiance's mother agreed applicant was of average intelligence. (RR32: 78).

The bulk of the defensive testimony was aimed at persuading the jury, not that this crime was a result of impaired mental ability or disadvantaged upbringing, but that this crime was an aberration of appellant's good character. But the State's evidence tended to show applicant's character for violence and contempt for authority. Given this state of the evidence and the jury's agreement to use the nullification charge if appropriate, this Court can have a fair (indeed, ample) assurance that the jury in this case voted for death simply because, after considering applicant's evidence, they did not believe it warranted a life sentence. The Court should therefore conclude that the nullification charge did not harm applicant or contribute to his death sentence.

PRAYER

The State prays that this Honorable Court will conclude applicant has procedurally defaulted his jury charge complaint or, in the alternative, hold that the jury charge, absent the nullification instruction, was a sufficient vehicle for the jury to give effect to applicant's mitigation evidence, or, in the alternative, conclude that the error was harmless, and deny the relief requested by applicant.

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing State's brief has been served on Matthew Paul, State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711 and Jordan Steiker, attorney for applicant, 727 East Dean Keeton St., Austin, TX 78705 by depositing same in the United States Mail, postage prepaid on March 25, 2005.

/s/ Kim Schaefer
KIM SCHAEFER

Opinion on Remand from the U.S. Supreme Court, Texas Court of Criminal Appeals, *Ex parte LaRoyce Lathair Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006)

COURT OF CRIMINAL APPEALS OF TEXAS

No. AP-74228

Ex parte LAROYCE LATHAIR SMITH,
Applicant.

March 1, 2006

OPINION

COCHRAN, J., delivered the opinion of the Court in which KELLER, *P.J.*, and PRICE, WOMACK, and JOHNSON, *JJ.*, joined.

This death-penalty habeas corpus case is on remand from the United States Supreme Court.[1] Our original opinion held that the *Penry*[2] jury nullification instruction given in applicant's case was not constitutional error because: (1) applicant's mitigation evidence was not "constitutionally relevant"; (2) his evidence was encompassed by the two statutory special issues, thus no special instruction was necessary; and (3) if a special instruction was necessary, the nullification instruction sufficed.[3] The Supreme Court reversed this Court's

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[1] *Smith v. Texas*, 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004) (*per curiam*).

[2] *Penry v. Lynaugh*, 492 U. S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[3] *Ex parte Smith*, 132 S.W.3d 407, 409, 412-16 (Tex. Crim.App.2004).

decision on the first and third issues; arguably, it did not approve of our resolution of the second issue. We now hold that, assuming that the statutory special issues were not wholly sufficient to allow the jury to give "*full* consideration and *full* effect to mitigating circumstances,"[4] applicant has failed to show "egregious harm" under *Almanza*[5] for this unobjected-to jury-charge error. We therefore deny relief.

I.

In 1991, a jury convicted applicant of capital murder for the robbery-murder of Jennifer Soto. Because an analysis of all of the evidence offered at trial is an essential component of any *Almanza* "egregious harm" analysis, we set out that evidence in detail.

First, we review the evidence from the guilt stage. The State's evidence showed that Jennifer Soto was a 19-year-old girl who worked at Taco Bell. She was a hard worker and had been promoted to shift manager two weeks before her death. Applicant had worked at Taco Bell with her. On the evening of January 7, 1991, she was "closing manager" and Travis Brown was working with her. He was waiting for her to finish her office paperwork because she was going to give him a ride home.

Meanwhile, Nickles Lewis and two other friends came to applicant's house. Applicant told them that he was going to rob Taco Bell because he needed "some money for court." The four youths left applicant's house on foot, but they were

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[4] *Penry v. Johnson*, 532 U.S. 782, 797, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*) (quoting *Johnson v. Texas*, 509 U. S. 350, 381, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (O'Connor, J., dissenting)).

[5] *Almanza v. State*, 686 S.W.2d 157 (Tex.Crim.App.1984) (op. on reh'g). *See Penry v. State*, 178 S.W.3d 782, 788 (Tex. Crim.App.2005) (applying *Almanza* harmless error analysis to constitutionally erroneous jury instruction concerning use of mental impairment evidence that did not rise to level of mental retardation).

soon picked up by Kevin Shaw and one of Shaw's friends who were riding around in Shaw's car. They stopped at another house so applicant could get a gun, and applicant said, "We're going to hit T.B." Applicant knew Jennifer would be working that night. He told one of his cohorts, "If she see[s] my face, I will have to kill her."

Kevin Shaw parked the car containing the six youths across the street from the Taco Bell. Applicant, Kevin Shaw, and a third member of the group, Devario Smith, got out of the car and paced outside the Taco Bell, waiting for Jennifer to come out of the back door. They waited 45 minutes, but she did not come out. When "things didn't go right," they all got back into the car and started to leave, but applicant said, "No, man, it got to be done. It got to be done." They turned around and went back.

At about 11:30 p.m., applicant knocked on the front door and asked to use the phone because his car had broken down. Travis, without opening the door, said that the Taco Bell was closed and that applicant could not come in. Applicant then asked to see Jennifer and when she came to the door, he repeated his request. Jennifer opened the door partway and applicant hugged her as he, Kevin, and Devario went inside. She showed applicant the telephone and went back to the office to finish up her paperwork while applicant's two companions stayed in the front with Travis.

After he pretended to finish his telephone call, applicant came back to the front and told Travis that "they were going to rob the place." Kevin told Travis, "If you keep your mouth shut, you'll get a cut of the money." Applicant went back, by himself, into the office where Jennifer was working.

Shortly thereafter, Travis heard yelling. When he went to investigate, he saw applicant holding Jennifer in a headlock. He was "pistol-whipping" her on the head with the butt of a gun. He kept hitting her until the gun's handle fell off. Applicant demanded the combination of the safe, but Jennifer

screamed, "Call Tina, call Tina." She did not know the combination. Travis saw applicant step back, point the gun at Jennifer's back and shoot her at point blank range. She cried, "God, please don't let me die."

Applicant then went into the kitchen area, grabbed a butcher knife, and came back to Jennifer, continuing to demand the combination. He stabbed her underneath the left breast to make her tell him the combination, but when she did not give him the information he wanted, he stabbed her in the thigh, then the abdomen, then the head. The State characterized these as "torture type wounds." Finally, he sliced her neck, severing the jugular vein. Both the gunshot and the neck wound were fatal.

Applicant, still carrying the bloody knife, walked out to the front. Travis jumped out of the way, saying "Hey, I don't know your face. I've never seen you. I don't know anything." Applicant replied, "Hey, I know your face and I'll kill you." After applicant and his two cohorts left, Travis called 911.

Applicant testified on his own behalf and stated that he was nineteen years old at the time of the robbery-murder and that he was, by the time of trial, the father of a baby boy. He stated that when Kevin Shaw drove by on January 9, 1991, he stopped and asked applicant and his friends if applicant's "home-boy" would let Kevin use his gun. Applicant went to his friend's apartment and asked him if Kevin could buy his gun. The friend agreed and gave applicant his gun, which was in a bag. Nobody said anything about going to the Taco Bell until the car arrived there.

Then, according to applicant, Kevin suddenly announced, "I'm fixing to rob Taco Bell." Kevin explained to applicant, "Travis is going to open the back door so I can rob it." Applicant and two others waited around for a while, but Travis did not come outside, so they all left, but Kevin insisted that they return. According to applicant, Kevin

knocked on the door, Travis opened it, and Kevin, Devario, and applicant entered. Jennifer never came to the front of the store. Applicant stayed in the front with Travis until he heard a shot, and then he went back to the office and saw Kevin hitting Jennifer with the gun until it broke. Kevin told Jennifer to open the safe, but she didn't know the combination. Then Kevin picked up a butcher knife and started stabbing Jennifer. Applicant grabbed the bloody knife away from Kevin and started out of the store with it. Travis said, "Damn, man, that wasn't even in it." Applicant testified that Travis's statement meant that killing Jennifer was not part of the "plan" to rob the Taco Bell that Travis was involved in.

Applicant said that he knew Jennifer, liked her, and thought that "no one should die the way she died." According to applicant, all of the State's witnesses, including his friends who were with him that night, lied about the robbery-murder at Taco Bell. He was a "Good Samaritan" who tried to save Jennifer by grabbing Kevin's knife.

The jury rejected applicant's version of the events and convicted him of capital murder.

During the punishment phase, the State offered evidence that, two days after murdering Jennifer, applicant had physically assaulted Chris Standmier, the former boyfriend of applicant's then-current girlfriend. Chris testified that he was home for the Christmas holidays from Prairie View University. He was standing in his mother's apartment parking lot when two cars pulled up. Applicant got out of one of them, took out a baseball bat and proceeded to beat Chris with it. Applicant hit Chris so hard that the bat broke in two. As Chris lay on the ground, applicant went back to the car, pulled out a Tech 9 pistol from the car, cocked it and told Chris, "N----, get back from me. I'm going to kill you. I'll kill you." Chris said, "You got me." Then applicant got back into the car and they drove off. Chris went to the hospital.

The State also offered evidence that two months before the capital murder, officers arrested applicant on outstanding warrants as he was walking down the middle of the street in a high-crime area. While booking him into the jail, officers found ten ziplock baggies of crack cocaine in his underwear.

Several of applicant's teachers testified about applicant's conduct in school. One teacher, who taught applicant economics and math, testified that applicant was "taunting" in class and used abrasive, obscene language. He was sometimes mean and sometimes "docile." This high school teacher said that applicant seemed "threatening"—as if he would hurt the teacher—when he insisted that the teacher give him a passing grade in economics. The teacher was scared, in part because he was positive that applicant had earlier stolen his car's tires and rims.

Applicant's middle school vice-principal testified that he had suspended applicant from school for disruptive behavior in the classroom, possible weapons violations, throwing objects at teachers, and profanity. He had a bad reputation for peaceful and law-abiding activity and for respect toward authority.

A Dallas police officer, a member of the Youth Division at applicant's high school, testified that he found a Tech 9 in a locker shared by applicant and Nickles Lewis. Nickles told the officer that the gun was his, but applicant had five bullets in a bag he was carrying at the time. The officer thought applicant had a gun also, but he was unable to find it.

The defense called nineteen witnesses during its punishment case. Fifteen of those were character witnesses. Applicant's middle school assistant principal testified that he had "8,000 problems at school, but applicant wasn't one of them," because he did not recall applicant. A pastor said that applicant's family attends church, and applicant always came with his mother. "[H]e's always been an impressive young

man." He showed respect to the people at church and to his mother. When the pastor visited applicant in jail he showed remorse for Jennifer's death: he began to cry and said, "I saw her body." He thought applicant was capable of rehabilitation. The pastor said that he was aware that applicant's father stole from the family to support his crack habit. He said that such things have an adverse effect upon children: "Family troubles definitely affect the children." Although the pastor had never been to applicant's home and had never counseled applicant personally, he did not think that applicant would be a future danger to society.

The custodian of records for the special education department of the Dallas ISD testified that applicant's records showed that he could not read or do numbers in kindergarten. According to his kindergarten teacher, applicant "is a little rough, but enjoys his friends; he must be kept separate from a few because he's easily led into trouble." At the age of ten, applicant was diagnosed as learning disabled with a speech handicap. He was put into a special education reading group[6] and given speech therapy. According to these school records, when he was eleven in 1982, applicant was

> implicated in numerous thefts at school, particularly of the speech clinician's purse. School contact with the parent indicated that LaRoyce has also been believed to be stealing at home. . . . Family stresses are reported. LaRoyce's behavior in class is exemplary and it has shocked school personnel that LaRoyce has been involved in stealing. He has admitted to theft and has cried when questioned about misbehavior.

At the age of thirteen, his WISC-R I.Q. testing showed a verbal I.Q. of 75, performance I.Q. of 84, and a full scale I.Q.

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[6] In the 1991 trial, the records custodian testified that each year over 13,000 children in the Dallas Independent School District were involved with special education classes, and the district employed 800 personnel in that one department.

of 78. At the end of 1986, applicant was phased out of the special education reading program because he then performed at grade level.

A high school classmate and football player testified that applicant once came to his rescue when a group from another high school "jumped him" and stabbed him. He thanked applicant, who said, "That's what friends are for."

Applicant's fiancee, the mother of his child, testified that applicant is not violent. Applicant would advise her sisters about doing their homework and not to make mistakes like he did. "Don't do what I did, you know, and slack off." According to her, applicant "just got with the wrong people, that's all." According to the fiancee's mother, applicant acted like a surrogate father to his younger sister. "[H]e appeared to try to guide her and keep her aware of society, people, boys, and things, and help her select appropriate young men friends." He is "a person who has been taught right from wrong and who respects society and respects people." He has an "average" intelligence and "is a person who has an intelligence capable of understanding and learning."

Applicant's best friend testified that he had not seen applicant be abusive to women. Applicant's brother, Myron, worked for UPS. He testified that when applicant's father went off on his motorcycle and used crack, Myron acted as a father figure to applicant. Applicant's mother brought her VCR, TV, microwave, and Tupperware over to Myron's house so applicant's father couldn't steal them and sell them for drugs. The family problems "affected" applicant, but Myron did not elaborate on the effect of these problems. A friend of applicant's mother testified that the father's drug habits affected the family because his mother had to act as both parents and she had "to pay the bill if we go out to eat like we used to." A legal assistant and student at UT-Arlington thought applicant was "a big loveable teddy bear" who had a lot to contribute to society because "he is willing

to help people." A 69-year-old former neighbor testified that applicant "has been a good neighbor" and played with his grandchildren. A woman who had dated applicant's older brother testified that when she had a young baby and no income, applicant invited them to stay at his house. He let her use his bedroom with its queen-sized waterbed while he slept on the living room sofa. Applicant told her that because of his father's drug habit, he had to be the man of the house, so he went out and got a job at age fifteen or sixteen. The mother of one of applicant's former girlfriend's testified that she never had a problem with applicant; he was a fun person, always kidding around. He brought her a corn plant and a couple of ivy plants; he bought her some mirrors. Another friend testified that applicant is a nice young man: "He's the type I wouldn't mind having for a son." He was never disrespectful or violent.

Applicant's mother testified that she thinks applicant still has worth and value as a human being. Applicant "is a good child. He was a slow learner, but he's worthwhile. There's no way [applicant] would have hurt Jennifer. He was too crazy about Jennifer. She was a good and decent child. I'm so sorry for [her] family." Applicant's mother knew that applicant "would never hurt nobody."

In rebuttal, the State called a different middle-school assistant principal who testified that he had received numerous disciplinary referrals about applicant. One of them read, "LaRoyce talks out in class daily. He laughs out loud, plays around, and disrupts class daily. I cannot tolerate him." Applicant told a different teacher, "I'm going to kick your ass." Another of applicant's high school teacher's testified that he had applicant in his pre-Algebra and physical-science class. "In one class, he called me a m--- f---- 7 times in one 55 minute period. On two occasions he tried to kill me. On one occasion he was going to put a bullet in my m--- f --- ing head." Applicant was taken out of this teacher's class after

about six weeks: "He would come in with no books, no preparation, never do any work, and sit sideways in the seat and just act like a little portent of evil. . . . He was always a big-time problem. It was a constant conflict."

At the punishment-charge conference, applicant requested an instruction on the objectives of the Penal Code as set out in Section 1.02; the trial court granted that request. Applicant also objected to the "anti-parties" instruction and asked for an instruction requiring the jury to find, "point-blank," that it was applicant who "directly" killed Jennifer by his own conduct. The trial court refused that instruction. The trial judge also gave the jury a non-statutory nullification instruction pursuant to the Supreme Court's then-recent decision in *Penry v. Lynaugh*.[7] Applicant did not object to the jury nullification instruction.[8]

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[7] 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (*Penry I*).

[8] Applicant filed a pretrial "Motion to Declare Tex.Code Crim. Proc. Ann. Art. 37.071 Unconstitutional," claiming that the entire Texas statutory death-penalty scheme was invalid after *Penry I*, because "it does not provide for the introduction and subsequent use by the jury of mitigating evidence which is not relevant or material to the special issues." Therefore, according to applicant, the trial court was precluded from providing *any* instructions regarding mitigating evidence. "For the trial court to create a scheme that would permit the jury to respond to the Defendant's mitigating evidence would contradict the current status of the law."

The trial court denied this motion at a pretrial conference, but gave applicant's counsel a draft copy of the punishment charge and stated,

If you see something in that charge that you'd like worded differently or you think could be made clearer or better, I'm always willing to entertain different wording or different ways of putting the idea. So if you come up with something better, just let me know and I'll look at it.

Applicant did not have any objection to the specific wording of the punishment charge; his objection went to the continued validity of the Texas statute after *Penry I*.

Based upon the evidence admitted at trial and the trial judge's instructions, the jury answered the two special issues "yes," and the trial judge sentenced applicant to death.

On direct appeal, applicant claimed that, under *Penry I*, Article 37.071 was unconstitutional because the jury was unable to give effect to his mitigating evidence in answering the special issues.[9] We rejected this claim and held that, even if applicant's mitigation evidence were beyond the scope of the two statutory special issues, the trial judge's supplemental instruction provided a sufficient vehicle for the jury to fully consider all of that evidence.[10] The Supreme Court declined to review applicant's claims on direct appeal.[11] We dismissed applicant's first petition for writ of habeas corpus because it was untimely filed, and he did not show any excuse or exception for its late filing.[12] The Supreme Court again denied certiorari.[13] We then allowed applicant to file a second petition for writ of habeas corpus which included, *inter alia,* a claim that the trial judge's supplemental "nullification" instructions were unconstitutional under the *Penry II* standard announced by the Supreme Court in 2001. We denied relief,[14] but the Supreme Court reversed our decision based upon its own opinion in *Tennard v. Dretke*,[15] which was delivered several months after our decision.

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[9] This claim was based upon his pretrial motion to declare article 37.071 unconstitutional as applied.

[10] *Smith v. State*, No. 71,333 slip op. at 10-11 (Tex.Crim.App. June 22, 1994) (not designated for publication).

[11] *Smith v. Texas*, 514 U.S. 1112, 115 S.Ct. 1967, 131 L.Ed.2d 857 (1995).

[12] *Ex parte Smith*, 977 S.W.2d 610 (Tex.Crim.App.1998).

[13] *Smith v. Texas*, 525 U.S. 1148, 119 S.Ct. 1047, 143 L.Ed.2d 53 (1999).

[14] *Ex parte Smith*, 132 S.W.3d 407 (Tex.Crim.App.2004).

[15] 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004).

In our former opinion, we noted that applicant relied on evidence of

> (1) his limited mental capacity, specifically that he was a "slow learner" in school, that he had an I.Q. of 78 and possible organic learning disabilities, and that he had dropped out of school in the ninth grade at the age of eighteen;
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> (2) his youthful age of nineteen at the time he committed this capital murder; and
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> (3) his father's time in prison, involvement with a motorcycle gang, drug and alcohol use, and stealing from his own family;

to support his claim that he produced *Penry* type evidence beyond the scope of the two statutory special issues.[16] We held that applicant had failed to show that any mitigating quality of his family background and mental-limitations evidence could not be fully encompassed by the two statutory special issues. Applicant's mental limitations were surely relevant to whether he acted deliberately in committing this robbery-murder and both his learning disability and troubled background were relevant to whether he would constitute a future danger to society. In *Penry,* the evidence supported an inference that the defendant was unable to learn from his mistakes as a result of his low I.Q., brain impairments, and severe childhood abuse. Thus, he was more likely to be a future danger because of his permanent disabilities. Here, the evidence shows the reverse: despite applicant's limitations and difficulties, his behavior in school was often "exemplary." There is no evidence that applicant was unable to learn from experience or unable to control his conduct, with or without his disabilities.[17]

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[16] *Smith*, 132 S.W.3d at 413.

[17] *Id.* at 414-15. We footnoted *Graham v. Collins*, 506 U.S. 461, 475-76, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), in which the Supreme Court

The Supreme Court did not address our conclusion "that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence."[18]

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stated, "We do not read *Penry* as effecting a sea change in this Court's view of the constitutionality of the former Texas death penalty statute; it does *not* broadly suggest the invalidity of the special issues framework." *Id.* at 474, 113 S.Ct. 892 (emphasis in original). The Supreme Court explained that in Gary Graham's case,

> the rule that Graham seeks is not commanded by the cases upon which *Penry* rested. In those cases, the constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer. In *Lockett [v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)], *Eddings [v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)], *Skipper [v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)], and *Hitchcock [v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)], the sentencer was precluded from even considering certain types of mitigating evidence. In *Penry*, the defendant's evidence was placed before the sentencer but the sentencer had no reliable means of giving mitigating effect to that evidence. In this case, however, Graham's mitigating evidence was not placed beyond the jury's effective reach. Graham indisputably was permitted to place all of his evidence before the jury and both of Graham's two defense lawyers vigorously urged the jury to answer "no" to the special issues based on this evidence. Most important, the jury plainly could have done so consistent with its instructions. The jury was not forbidden to accept the suggestion of Graham's lawyers that his brief spasm of criminal activity in May 1981 was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated. Even if Graham's evidence, like Penry's, had significance beyond the scope of the first special issue, it is apparent that Graham's evidence—*unlike* Penry's—had mitigating relevance to the second special issue concerning his likely future dangerousness. Whereas Penry's evidence compelled an affirmative answer to that inquiry, despite its mitigating significance, Graham's evidence quite readily could have supported a negative answer.

Id. at 475-76, 113 S.Ct. 892.

[18] *Smith*, 132 S.W.3d at 415-16.

II.

The usual method by which we assess purported jury instruction or charge errors is set out in *Almanza v. State.*[19] The *Almanza* standard applies both on direct appeal[20] and on the review of habeas corpus applications.[21] *Almanza* applies to federal constitutional errors contained within the jury charge.[22] Under that familiar standard, we must decide:

1. Was there error in the jury charge?

2. If so, "the next step is to make an evidentiary review . . . as well as a review of any other part of the record as a whole which may illuminate the actual, not just theoretical, harm to the accused." If the defendant failed to object to the jury charge, he must show that the error caused him such egregious harm that he did not have "a fair and impartial trial."[23]

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[19] 686 S.W.2d 157 (Tex. Crim.App. 19 84) (op. on reh'g).

[20] *See, e.g., Pickens v. State*, 165 S.W.3d 675,-680 (Tex.Crim.App. 2005) (unobjected-to jury charge error is analyzed for "egregious harm" under *Almanza*).

[21] *See Ex parte Maldonado,* 688 S.W.2d 114, 116 (Tex.Crim.App. 1985) (unobjected-to jury-charge error is analyzed under *Almanza's* "egregious harm" standard on habeas). *Cf. Ex parte Dutchover*, 779 S.W.2d 76, 77-78 (Tex.Crim.App.1989); *Ex parte Crispen*, 777 S.W.2d 103, 104-05 (Tex.Crim.App.1989), *id.* at 106-10 (Clinton, J., concurring) (arguing that court should limit cognizability of habeas claims to "exceptional" constitutional defects so "'fundamental' as not to be susceptible to a determination of harm").

Indeed, it would be quite illogical to employ a lesser standard of review for constitutional error on habeas review than on direct appeal. Were we to follow *Almanza* for jury-charge error on direct appeal, but adopt a lesser standard of review on habeas, the natural and logical result would be that all jury charge claims would be deferred until a person filed a petition for the writ of habeas corpus.

[22] *Jimenez v. State*, 32 S.W.3d 233, 238 (Tex.Crim.App.2000).

[23] *Almanza*, 686 S.W.2d at 174 (such a fundamental error must "go to

We will apply our usual *Almanza* analysis to applicant's claim that the jury charge did not ensure that the jury could give full effect to his mitigation evidence.

Therefore, we first re-examine whether applicant's mitigation evidence was fully encompassed within the two statutory special issues.[24] In our 2004 opinion, we held that the jury could fully address this evidence within the confines of the two special issues, but we used an analytical framework that was later repudiated by the Supreme Court in *Tennard*.[25] We are uncertain whether the Supreme Court also concluded that some of applicant's mitigation evidence was outside the reach of the two special issues, and, if so, exactly what evidence was beyond the ambit of those special issues.

Traditionally, this Court has looked to the factors set out in *Keeton v. State*[26] (decided two years before *Penry I*) to determine whether the State has proven, beyond a reasonable doubt, that the defendant would probably commit criminal acts of violence that would constitute a continuing threat to society. Those factors include, but are not limited to:

> (1) the circumstances of the capital offense, including the defendant's state of mind and whether he was working alone or with other parties;
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> (2) the calculated nature of the defendant's acts;
>
> (3) the forethought and deliberateness exhibited by the crime's execution;

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the very basis of the case," or "vitally affect his defensive theory").

[24] On direct appeal, we did not explicitly address this question. *Smith*, No. 71,333 slip op. at 10-11.

[25] *See Tennard*, 542 U.S. at 284-88, 124 S.Ct. 2562 (rejecting Fifth Circuit's threshold standard for constitutionally relevant mitigating evidence); *Smith v. Texas*, 543 U.S. at 44, 125 S.Ct. 400 (rejecting this Court's reliance upon Fifth Circuit's standard).

[26] 724 S.W.2d 58 (Tex. Crim.App.1987).

(4) the existence of a prior criminal record, and the severity of the prior crimes;

(5) the defendant's age and personal circumstances at the time of the offense;

(6) whether the defendant was acting under duress or the domination of another at the time of the offense;

(7) psychiatric evidence; and

(8) character evidence.[27]

We relied upon these specific factors in rejecting applicant's claim, on direct appeal, that the evidence was insufficient to prove, beyond a reasonable doubt, that applicant would probably commit criminal acts of violence that would constitute a continuing threat to society.[28] Indeed, in his brief on direct appeal, applicant relied upon the very evidence that he now contends the jury could not adequately address under the two special issues to support his argument that the evidence was legally insufficient to show his future dangerousness. There he argued: "Appellant was nineteen years old at the time of the offense. He produced evidence that he was close to being mentally retarded and at the very least had a history of learning disabilities. His evidence showed a history of family strain caused by his father, who sold the family's personal property to buy cocaine."[29] According to applicant, this evidence, coupled with "[a]ppellant's extensive character evidence, which essentially went unrebutted by the State, established that appellant did not have a violent character and that the offense was an aberration."[30]

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[27] *Keeton*, 724 S.W.2d at 61.

[28] *Smith v. State*, No. 71,333 slip op. at 2-5 (Tex.Crim.App. June 22, 1994) (not designated for publication).

[29] Brief on Direct Appeal at 27.

[30] *Id.* at 29.

It would logically follow that, if applicant's mitigating evidence fit within the *Keeton* factors and was relevant in assessing the legal sufficiency of the evidence to support a jury's verdict of "future dangerousness," that evidence would be encompassed under the "future dangerousness" special issue. Evidence of applicant's youth would clearly be encompassed under the fifth *Keeton* factor, and Texas courts have agreed with the Supreme Court that the mitigating value of a defendant's youth can be considered under the "future dangerousness" special issue.[31] Similarly, evidence of applicant's generally "exemplary" behavior in his special-education classes could be considered under both the fourth and eighth *Keeton* factors as showing a relative lack of criminal behavior and generally good character. Evidence of his father's drug habit and theft from his family which may have "affected" applicant's character in some way[32] could be considered under the eighth factor.[33] Arguably, evidence of

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[31] *See Johnson v. Texas*, 509 U.S. 350, 368, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (mitigating value of capital defendant's youthfulness was encompassed by Texas's second special issue; "It strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second special issue."); *Graham*, 506 U.S. at 475-76, 113 S.Ct. 892; *Barley v. State*, 906 S.W.2d 27, 39 (Tex.Crim.App.1995) ("Evidence of a defendant's age at the time of the offense is also a relevant consideration to whether a defendant constitutes a future danger to society. The United States Supreme Court has repeatedly approved of the consideration of a defendant's youth at the time of the offense because the impetuous qualities associated with youth are typically mollified by age and maturity.") (citations omitted).

[32] It is possible that applicant's conduct of stealing from his mother and his teachers might be connected to his knowledge of his father's thievery, but no witness ever made such a connection.

[33] *See Graham*, 506 U.S. at 476, 113 S.Ct. 892 (indicating that family background evidence falls within the scope of Texas's special issues; "Graham's evidence of transient upbringing and otherwise nonviolent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retarda-

applicant's somewhat limited mental capacity (a school record notation of a full scale I.Q. of 78, and another cursory note on the same school form of "possible organic cause for learning problems") could not be fully considered under the *Keeton* factors, although Texas cases have held that evidence of limited mental ability may be considered under both statutory special issues.[34]

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tion and harsh physical abuse"); *Zimmerman v. State*, 881 S.W.2d 360, 362-63 (Tex.Crim.App.1994) (defendant's mitigating evidence that he came from a "'very disruptive, uneven family environment,' he experienced parental abandonment on two occasions, and that . . . he had suffered some abuse as a child" could be considered under two special issues). In our original habeas corpus opinion, we stated that applicant's father had been in prison for robbery, was involved with a motorcycle gang, consorted with other women, used alcohol and drugs, and stole from his own family. This situation upset applicant. Because the family did not have a lot of money, applicant began looking for work as a young teenager. According to defense witnesses, applicant suffered because of his father's thefts from the family and from a lack of money in the home. 132 S.W.3d at 413. However, no witness at trial described how the conduct of applicant's father did, or might have, "affected" applicant, except to say that he got a part-time job at the age of 15 or 16.

[34] *See, e.g., Zimmerman*, 881 S.W.2d at 362 (defendant's mitigating evidence, including testimony that his I.Q. was "in the 80's," could be considered under the statutory special issues); *Gunter v. State*, 858 S.W.2d 430, 445-46 (Tex.Crim.App.1993) (mitigation evidence that defendant was abandoned by mother, abused as a child, and subject to strict discipline by adopted parents who sent him to school unbathed and unfed as punishment could be considered under special issues), *overruled on other grounds by Riley v. State*, 889 S.W.2d 290 (Tex.Crim.App. 1994); *Goss v. State*, 826 S.W.2d 162, 166-67 (Tex.Crim.App.1992) (evidence of troubled childhood is adequately considered within second special issue); *Williams v. State*, 773 S.W.2d 525, 537-38 (Tex.Crim. App.1988) (evidence of defendant's low I.Q., though relevant to special issues, did not preclude jury from finding that he acted deliberately or from making an affirmative finding of future dangerousness); *Goodman v. State*, 701 S.W.2d 850, 866-67 (Tex.Crim.App.1985) (defendant's evidence of mild mental retardation did not make evidence insufficient to support jury's findings of deliberateness and future dangerousness),

We also note that numerous post-*Smith*, post-*Tennard* Fifth Circuit cases have held that mitigating evidence of this type is fully encompassed by the Texas "future dangerousness" or "deliberation" special issues.[35] Nonetheless, because we are

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overruled on other grounds by Hernandez v. State, 757 S.W.2d 744 (Tex. Crim.App.1988).

[35] In most of its post-*Tennard* decisions, the Fifth Circuit has concluded that the defendant's mitigating evidence could be fully addressed by the jury under the two Texas special issues. *See, e.g., Summers v. Dretke*, 431 F.3d 861, 882 (5th Cir.2005) (defendant's evidence of good character and good conduct could be given effect under Texas's statutory special issues); *Draughon v. Dretke*, 427 F.3d 286, 297-98 (5th Cir.2005) (defendant's evidence of abuse as a child and "dysfunctional upbringing" could be given effect under future dangerousness issue); *(Roy Gene) Smith v. Dretke*, 422 F.3d 269, 287 (5th Cir.2005) (defendant's evidence of addiction/ intoxication and childhood poverty were seemingly both covered by the special issues; arguably, evidence of his exposure to a crime-infested environment might not have been; COA on *Penry* claim granted); *Cole v. Dretke*, 418 F.3d 494, 500-11 (5th Cir.2005) (statutory special issues were broad enough to encompass defendant's evidence of his "destructive family background," fragmented personality, organic neurological deficiency, and youth); *Coble v. Dretke*, 417 F.3d 508, 522-27 (5th Cir.2005) (defendant's evidence of troubled childhood, mother's nervous breakdown, his orphanage, post-Vietnam mental instability, mental illness that could be controlled by medication, as well as evidence that he was well-respected and liked were all covered by statutory special issues; noting that "the supplemental instruction given in addition to the special issue interrogatories is *only* unconstitutional where the special issues themselves are not broad enough to provide a vehicle for the jury to give effect to the defendant's mitigation evidence"; any error in giving the supplemental instructions would be harmless and therefore not the basis for habeas relief); *Brewer v. Dretke*, 410 F.3d 773, 777-78 (5th Cir.2005) (special issues covered defendant's evidence that he had a bout with mental illness three months before murder, co-defendant manipulated him, he was abused by his father, saw his father abuse his mother, and he abused drugs).

In *Bigby v. Dretke*, 402 F.3d 551, 564-72 (5th Cir.2005), however, the Fifth Circuit found that the defendant's evidence that he suffered from untreatable chronic paranoid schizophrenia was *not* encompassed by the statutory special issues; thus, it granted habeas relief to Bigby.

uncertain as to the Supreme Court's current *Penry II* jurisprudence,[36] we will assume, for the sake of argument, that at least some of applicant's evidence was not fully encompassed by the two special issues. Thus, we shall assume that the jury charge in this case was constitutionally deficient under *Penry II.*

III.

A constitutionally deficient jury charge, however, does not result in automatic reversal of a conviction under *Almanza.* We must also assess the harm that this deficient jury charge caused the defendant. Whether sufficient harm resulted from the charging error to require reversal depends upon whether the defendant specifically objected to the error at trial. Under *Almanza,* when there has been a timely objection made at trial, we look only for "some harm." By contrast, where the error is urged for the first time on appeal or an application for habeas corpus relief, we look for "egregious harm."[37] We most recently applied our familiar *Almanza* standard of review to constitutional error in the jury charge in reversing the

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[36] The Fifth Circuit seems to share our uncertainty. *See, e.g., (Roy Gene) Smith v. Dretke*, 422 F.3d 269, 287 n. 8 (5th Cir.2005) ("We note that the Supreme Court has never explicitly stated that *Penry* claims cannot be extended beyond claims involving evidence of 'mental impairment.' In fact at times, it seems the Court has said the exact opposite. . . . The only mention the *Smith* Court made of whether the defendant's evidence was outside the reach of the special issue questions was the Court's single sentence that 'just as in *Penry II*, petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented.'").

[37] *Almanza, supra*, 686 S.W.2d at 171; *Arline v. State*, 721 S.W.2d 348, 351 (Tex.Crim.App.1986).

third death-penalty sentence of Johnny Paul Penry.[38]

In analyzing jury-charge error under *Almanza* we review the entire trial record, from voir dire through closing ar-

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[38] *See Penry v. State*, 178 S.W.3d 782, 788 (Tex.Crim.App.2005) (stating that, after finding constitutional error in the jury charge, "[u]nder Code of Criminal Procedure Article 36.19, we will not reverse a conviction or sentence on the basis of jury charge error 'unless the error appearing from the record was calculated to injure the rights of the defendant, or unless it appears that the defendant has not had a fair and impartial trial.'"; finding "some harm" under *Almanza* to objected-to jury charge error); *see also Ngo v. State*, 175 S.W.3d 738, 750-52 (Tex.Crim.App.2005) (finding "egregious harm" under *Almanza* to unobjected-to constitutional error injury charge). As this Court stated in *Jimenez v. State*, 32 S.W.3d 233 (Tex.Crim.App.2000):

> The question in this case is, what standard of harmless error applies to error in a court's charge that was not objected to, and that is claimed to violate a constitutional provision? We hold that the applicable standard is that provided by article 36.19 of the Code of Criminal Procedure: "the judgment shall not be reversed . . . unless it appears from the record that the defendant has not had a fair and impartial trial."
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> *Id.* at 233. "A party is not excused from the procedural requirements for objecting at trial merely because an error involves a constitutional right." *Id.* at 235. We explained that to invoke the protection of this federal rule [of casting a burden on the State to prove, beyond a reasonable doubt, that constitutional error was harmless under *Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] in a state court, the appellant must have complied with the state court's procedural rule for preserving and presenting error. " 'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" If the right is forfeitable, as most rights are, an appellant who did not comply with the rules for preserving and presenting error must rely on the forum's rules for consideration of unpreserved error.

Id. at 238 (footnote and citations omitted).

guments at the punishment stage, to determine whether applicant suffered "egregious harm" from the deficient jury charge.

During voir dire, both the State and applicant questioned almost all potential jurors regarding their ability to consider mitigating evidence. Both sides explained the process of allowing jurors to change one of the special issue answer from a "yes" to a "no" if they found mitigating evidence sufficient to warrant a life sentence rather than the death penalty. Overwhelmingly, the jurors agreed that they could change a "yes" answer to "no" if instructed by the judge to do so upon finding sufficient mitigating evidence.[39] The Supreme Court specifically noted that the nullification instruction "intensified

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[39] The only exception was one juror (Mr. Zimmerman) who stated that he did not think that evidence of a defendant's drug abuse or childhood poverty would mitigate a death sentence. However, he indicated that he could consider other mitigating evidence such as mental capacity. The court then questioned him further:

> And after you have heard everything, if you thought well, [the answer to special question] one ought to be yes and [the answer to special question] two ought to be yes, but I think based on this man's something, something in his past, something about him, I don't think he ought to die, then you would be willing to go back and change one of the answers to no to make sure he didn't die; is that right?
>
> The juror said that he would be able to do so. Defense counsel argued that the juror could not consider mitigating evidence, and that his agreement with the questions posed by the court and the State were "simply paying lip service to the idea of actually really giving fair consideration to any mitigating circumstances in the case." When the trial court ruled that the juror was qualified, applicant used his final peremptory challenge on him. The court's ruling was within the bounds of reasonableness; furthermore, the juror was not em-paneled, and therefore applicant was not harmed by any potential prejudice caused by the juror's inability to consider a poor childhood or drug addiction as mitigating evidence.

the dilemma faced by ethical jurors"[40] in this case. That is indeed a possibility, although neither the jurors who served, nor the parties or trial judge noted such a potential dilemma or expressed such a concern, either during voir dire or later. *Almanza* requires a showing of "actual, not just theoretical, harm to the accused."[41] Given the record in this case, we cannot say that the discussion of the special issues and the nullification instruction during voir dire shows "actual" harm, much less "egregious" harm.

Turning to the evidence at the guilt stage, the State and the defense painted markedly different portraits of the Taco Bell robbery-murder and applicant's participation in that grisly deed. If the jury believed the State's evidence, applicant plotted to commit the robbery, and he was the leader of the pack. Applicant told a very different story. He had no idea that Kevin Shaw was planning to go to the Taco Bell that night, much less commit a robbery or a murder. Applicant was "a Good Samaritan" who snatched the bloody knife away from Kevin and took it out the door.

In sum, the State painted an evidentiary picture of Mr. Hyde; applicant presented a portrait of Dr. Jekyll. Both of these versions could not be true. The jury believed the State's version, but applicant's testimonial version of the events did not betray any lack of mental acuity. His testimony was clear, coherent, concise and consistent. He responded nimbly and held his own when the prosecutor cross-examined him.

The closing arguments at the punishment stage carried out the "Dr. Jekyll and Mr. Hyde" dichotomy. The State again emphasized the fact that the Taco Bell robbery-murder was applicant's idea. He knew Jennifer and he used his "charm" to get inside; then he hugged her. Her murder was pre-

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[40] *Smith v. Texas*, 543 U.S. at 48, 125 S.Ct. 400.

[41] 686 S.W.2d at 174.

meditated. He showed no remorse: after the murder, he matter-of-factly told his friends that "we had to shoot a girl," and his only concern was getting rid of his bloody jacket. The State referred to the prior aggravated assault of Chris Standmeir to show his continuing violence and to the prior possession of ten packets of cocaine to show his general lack of lawful conduct as well as his motive for the robbery.

The defense emphasized applicant's relative lack of prior criminality and his possible redemption and rehabilitation:

> The law answers those questions no, and only the evidence from that table can persuade you, if it can, to change those no answers to yes on those questions. That's the way the law works. Some of you said that you'd use it only as a last resort, only for habitual criminals who could not possibly be rehabilitated. . . . You said you would consider his track record, the kind of person he was deep down inside.
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> . . .
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> Continuing acts of violence. Is he a continuing threat to society? On voir dire, almost all of you told us that you were looking for someone who had a long criminal record, that's in and out of the penitentiary, someone who cannot be rehabilitated. . . . This boy has not spent one day in the penitentiary.

The defense argued that "it's not too late for LaRoyce." It pointed to the fact that many witnesses had testified that he was "no problem" in school or at home. The defense mentioned applicant's family life: "I think it would take a fool to not think that the things that were going on in that family when their daddy was selling their appliances for crack is not going to have any impact at school." The defense focused on how much worse applicant's cohort, Kevin, was and how he had a much worse background than applicant. He emphasized that applicant did not kill Travis, the other eyewitness, and if

he were so terrible, he would have done so. The defense spoke of the mitigating evidence:

> I want to talk to you about mitigating evidence. Mitigating evidence is that evidence that reduces the defendant's personal or moral culpability and may include, but is not limited to, any aspect of his character, record, background, or circumstances of the offense. It may go to one of the special issues, it may not, but the court tells you that the State has a burden that if you think that he should not die, you are to put "no" in one of the spaces, that the State has the burden of proof beyond a reasonable doubt to convince each and every one of you that he should still die.

He spoke of applicant's I.Q.:

> The evidence we have, medical diagnosis, slow learner, may be organic. Objective test data, I.Q. 78. He is eight points from being mentally retarded. Why do you think LaRoyce gets along so well with kids? Because he's like one, that's why. Because he's like one. . . . It shows he is not a leader [like Kevin Shaw], it shows he's a follower.

He spoke of the family problems:

> Family problems. [The prosecutor] will say, "Well, we've all had problems and many of us have been raised by single parents." That's true, but how many of us have had our daddies sell our appliances for crack, that we've had to take and hide our V.C.R.'s, our T.V.'s, our freezers, so our own daddy wouldn't go and sell it for crack? You know that that has an impact on someone. It has an impact on how they act in school.

He noted the prodigious number of defense witnesses:

> The numbers do mean something, how many of us could say if we were in trouble that we could have that many people come and say something good? These people

know him. You have known him for eight days. They have known him for their life. They say he should not die. He is not evil. That's not the only thing you can do with him . . . . there is something good about LaRoyce. There is something worth saving. . . . They tell you he can be rehabilitated. Is he the worst of the worst? Is he someone who can't be rehabilitated? Has the State proven beyond a reasonable doubt that in spite of this overwhelming mitigating evidence, that he still needs to die, that there is nothing else we can do with him or to protect society, that you have to exterminate him like you would a stray dog or cat?

He spoke of remorse:

Reasonable deduction from the evidence, he has learned and has remorse. Why would he cry in front of the minister when he talked about the girl?

. . .

The State of Texas must prove to you beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence. You shall answer no to one of the issues to give effect to your meaning. LaRoyce's life is in your hands, no question about that. . . . These people didn't get up here because they didn't have anything to do and wanted to have a quick thrill in the courtroom. They testified and came down here because they wanted to tell you there is something worth saving. Both the State and defense presented vibrant and compelling arguments for and against the two special issues and the nature and quality of the mitigating (and aggravating) evidence. The primary theme of the defensive evidence and closing argument was that LaRoyce Smith was a young man whose life was worth saving. He had triumphed over such disabilities as being a slow learner with family troubles, and had proven himself a

> role model to other family members and friends. His pastor spoke on his behalf, as did his mother, brother, fiancee, and fiancee's mother. All were certain that he would not pose a risk of violence in the future: "What LaRoyce needs is a controlled environment."

In its final argument, the State reminded the jury that they knew applicant was no dummy. He noted:

> The I.Q. testing, and that's why we when we see the records and it shows his I.Q. is 78, we introduce the rest of the packet and we examine that and we find that his I.Q. is close to 90 on other testing within that file. That's for your consideration, but I ask you to judge him by his testimony, by his street-smartness and by his testimony that he gave. Nobody is going to fool LaRoyce Smith on the witness stand. I mean, he is not a bumbling fool. He is an intelligent individual and he so testified. No argument there, I would think.

The State began its closing argument with the following:

> Now, when we talked to you on voir dire, we talked to you about—and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, "Mr. [prosecutor], Ms. [prosecutor], if you prove to me that the answers to those special issues should be yes, then I can answer them yes." If you wavered, if you hesitated one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now.

Significantly, the prosecutor never suggested that the jury should ignore or fail to consider any of applicant's mitigation evidence in deciding whether the answer to those special issues should be "yes" or "no." Of course, the prosecutor

properly focused upon the evidence that would support a "yes" answer to both special issues, just as the defense had properly focused upon the evidence that would support a "no" answer to those special issues. The prosecutor concluded his remarks with the following:

> Ladies and gentlemen, I'm going to be sitting down in just a few minutes. The case is going to be in your hands. When we talked to you on jury selection, we talked to you—we told you at that time what we felt the facts were going to call for, that this was an individual where the ultimate punishment is earned by him over the years. The brutality of this particular case standing alone, if you absolutely knew nothing else about LaRoyce Smith and his background, the brutality alone calls for the death penalty in this case. So, please this is the time to have compassion, not for this individual, not for this outlaw, but for the victim and the victim's family. We'd ask you to consider that.
>
> Thank you, Your Honor.

The prosecutor never suggested that applicant's mitigation evidence should be ignored, that it did (or did not) fit into the two special issues, or that once the jury truthfully answered the special issues, it should ignore applicant's other mitigation evidence.

Although the jury ultimately answered the special issues in a way that required the trial judge to impose the death penalty, we are unable to conclude that the statutory special issues and nullification instruction caused applicant "egregious harm" in its effect upon the jury's deliberation of his mitigating evidence. Applicant fails to provide any persuasive argument that the jury was unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take into account the specific evidence of his relatively low I.Q. test at the age of thirteen, his par-

ticipation in a special education reading program and speech therapy, or his troubled family background.[42] The basic defense theme was that he had triumphed over these youthful difficulties; he did not succumb to them. That is the strategy that his attorneys chose, and this is an approach that a jury might find persuasive.

Applicant's defensive evidence and theme created a very different picture of applicant than the evidence and theme that concerned the Supreme Court in *Penry*. In the latter case, the Supreme Court was troubled by Penry's "two-edged sword" evidence—the fact that he was mentally retarded was mitigating, but the fact that he was, therefore, unlikely to learn from his mistakes and incapable of rehabilitation or reformation, was aggravating.[43] Here, however, the defense was able to weave applicant's evidence of mental impairment, youth, and family background into a dramatic account of his humanity and triumph over adversity. It provided evidentiary support for defense counsel's well-crafted closing argument that "he has learned and has remorse" and thus he is "worth saving."

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[42] Applicant's position is that all *Penry* jury charge error is structural and thus immune from any harmless error analysis. This position conflicts with well-established Texas law under *Almanza*. It is inconsistent with our most recent decision in *Penry v. State*, 178 S.W.3d 782, 788 (Tex.Crim.App.2005). It would appear that, under Supreme Court precedent as well, *Penry* error is subject to review for harmless error. *See Brown v. Payton*, 544 U.S. 133, 125 S.Ct. 1432, 1452, 161 L.Ed.2d 334 (2005) (Souter, J., dissenting) (disagreeing with plurality which found no *Penry*-type error; concluding that the error was harmful under federal habeas standard set out in *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)); *see also Calderon v. Coleman*, 525 U.S. 141, 144-46, 119 S.Ct. 500, 142 L.Ed.2d 521 (1998).

[43] *Penry I*, 492 U.S. at 323-24, 109 S.Ct. 2934 ("Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future" because "one effect of his retardation is his inability to learn from his mistakes").

It is possible that the two special issues may not have fully and completely encompassed every single bit of applicant's mitigation evidence and he may have suffered "some" actual harm. However, we do not find that the deficient charge was so egregiously injurious to his right to have the jury consider and evaluate all of his mitigation evidence that he did not receive a "fundamentally fair trial."[44] All of his mitigating evidence was admitted, defense counsel did a superb job of weaving all of that evidence into a compelling theory of the case, and his attorneys presented a strong, coherent, and persuasive closing argument on punishment. We therefore conclude that applicant has failed to show, by a preponderance of the evidence, that the unobjected-to jury nullification instruction caused him "egregious harm." We deny relief.

HERVEY, J., filed a concurring opinion in which KEASLER, J., joined.

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[44] *Almanza*, 686 S.W.2d at 172.

HOLCOMB, J., filed a dissenting opinion.

MEYERS, J., not participating.

HERVEY, J., filed a concurring opinion in which KEASLER, J., joined.

Applicant has raised only an unpreserved federal constitutional claim that the two statutory special issues and the nonstatutory "nullification" instruction at his 1991 capital murder trial did not provide the jury with a vehicle to give appropriate effect to applicant's mitigating evidence. This Court disposes of this unpreserved claim on an independent state ground under our state-law "egregious harm" standard for "unobjected-to jury-charge error."[1] *See Jimenez v. State*, 32 S.W.3d 233, 237-39 (Tex.Cr.App.2000). This essentially is the same review for unpreserved issues in the federal system. *See Jimenez*, 32 S.W.3d at 238; *see also United States v. Olano*, 507 U.S. 725, 730-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

The Court's opinion asserts that applicant could theoretically have suffered "some" actual harm from the "deficient" charge because the "two [statutory] special issues may not have fully and completely encompassed every single bit of applicant's mitigation evidence." *See Smith*, op. at 472.[2] The Court nonetheless decides that applicant suffered no "egregious harm" from the "deficient" charge because the jury could still have meaningfully (though not fully) considered any mitigating evidence within the context of the two statutory special issues under the circumstances of this case. *See Smith*, op. at 472 (applicant fails to provide any per-

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[1] *See Ex parte Smith*, S.W.3d slip op. at 2 (Tex.Cr.App. No. AP-74,228, delivered this date) (op. on remand from United States Supreme Court).

[2] This apparently is the reason the Court considers the charge to be deficient; i.e., the charge did not provide the jury with a vehicle to "fully" consider some mitigating evidence.

suasive argument that the jury was unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take into account the specific evidence of his relatively low I.Q. test at the age of thirteen, his participation in a special education reading program and speech therapy, or his troubled family background).[3]

I would decide, however, consistent with the United States Supreme Court's decision in *Johnson v. Texas*, that the Constitution requires only that a jury be provided with a vehicle to meaningfully consider mitigating evidence and not, as the Court's opinion seems to decide, a vehicle to "fully and completely" consider mitigating evidence. *See Johnson v. Texas*, 509 U.S. at 354, 368-72, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (Constitution requires only that a jury have some "meaningful basis" to give effect to mitigating evidence not that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant").[4] Since the two statutory special issues provided

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[3] The Court's opinion also states, *Smith*, slip op. at 472:

> It is possible that the two [statutory] special issues may not have fully and completely encompassed every single bit of applicant's mitigation evidence and he may have suffered "some" actual harm. However, we do not find that the deficient charge was so egregiously injurious to his right to have the jury consider and evaluate all of his mitigation evidence that he did not receive a "fundamentally fair trial." [Footnote omitted]. All of his mitigating evidence was admitted, defense counsel did a superb job of weaving all of that evidence into a compelling theory of the case, and his attorneys presented a strong, coherent, and persuasive closing argument on punishment. We therefore conclude that applicant has failed to show, by a preponderance of the evidence, that the unobjected-to jury nullification instruction caused him "egregious harm."

[4] Footnote 4 of the Court's opinion in this case cites to former Justice O'Connor's 5-4 decision in Part III-B of *Penry v. Johnson*, 532 U.S. 782, 797, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*), which quotes from her dissenting opinion in *Johnson*, for the proposition that a jury must have a vehicle to give *"full* consideration and *full* effect to mitigating"

applicant's jury with a vehicle to meaningfully consider applicant's mitigating evidence, there was no deficient charge (i.e., no error) and consequently applicant could have suffered no harm, particularly if the Supreme Court's decision in *Johnson* is still good law. *See also Ex parte Smith*, 132 S.W.3d 407, 427-28 (Tex.Cr.App.2004) (Hervey, J., concurring). Under these circumstances, the additional, non-statutory "nullification" instruction was completely gratuitous and could only have benefitted applicant by providing the jury with another vehicle to consider any mitigating evidence more fully than what *Johnson* and the Constitution require. *See id.*

So, even if the law requires that a jury be provided with a vehicle to "fully and completely" consider mitigating evidence,[45] the "nullification" instruction, particularly with the way that it was carefully explained to the jurors during voir dire, accomplished this. *See Smith*, 132 S.W.3d at 427- 28 (Hervey, J., concurring). Since we are disposing of this case on an independent state ground, we are not bound by the view expressed in *Penry II*, 532 U.S. at 801-02, 121 S.Ct. 1910 that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable

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evidence. *See Smith*, slip op. at 457 n. 4 (emphasis originally in *Penry II* and *Smith*). Such a rule, however, would "effec[t] a sea change" and require a significant alteration in the Supreme Court's capital sentencing jurisprudence as very thoroughly discussed in Justice Kennedy's majority opinion for the Court in *Johnson*, 509 U. S. at 365-73, 113 S.Ct. 2658. It would be very difficult to conclude that *Penry II* overruled all of this jurisprudence, particularly *Johnson*, without expressly saying so. It would be even more difficult to conclude that Justice Kennedy, in joining Part III-B of former Justice O'Connor's opinion in *Penry II*, repudiated *sub silentio* the position that he so very thoroughly set out in *Johnson*.

[45] *But see Johnson*, 509 U.S. at 372, 113 S.Ct. 2658 (Constitution does not require that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant").

"nullification" instruction such as the one in this case. *See Smith*, 132 S.W.3d at 427 (Hervey, J., concurring).

I concur in the Court's judgment to deny habeas corpus relief.

HOLCOMB, J., filed a dissenting opinion.

I respectfully dissent. The majority misapprehends the plain directive of the United States Supreme Court in its reversal of this court: precisely, apply a harm analysis to Eighth Amendment error because "the nullification instruction was constitutionally inadequate under *Penry II*", effectively preventing the jury from giving full effect to Smith's relevant mitigating evidence.[1] *Smith v. Texas*, 543 U.S. 37, 48-49, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004) (*per curiam*). With the following comments, I dissent from the denial of habeas corpus relief.

Procedural Default

Although I was once persuaded to believe otherwise, Smith's federal constitutional claim that he was denied an effective vehicle by which a jury could consider and give effect to his mitigating evidence was not procedurally defaulted. *See Ex parte Smith*, 132 S.W.3d 407, 428 (Tex.Crim. App.2004) (HOLCOMB, J., concurring and dissenting). The majority appears to hold that, although Smith presented three written pre-trial motions upon his Eighth Amendment objection, his objection lacked the requisite specificity under our state-law error preservation rules, and therefore, his claim was procedurally defaulted. *See* Maj. op. *supra* at 462 & n. 9. And despite the fact that *Penry II* had yet to be decided, the majority holds that Smith's failure to object under the precise reasoning of *Penry II* is now fatal to his constitutional claim. Maj. op. *supra* at 462. Specifically, the majority faults Smith for arguing only that the applicable statute was unconstitutional as applied under *Penry I*[2], and thus, his failure to

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[1] *Penry v. Johnson*, 532 U.S. 782, 798, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*).

[2] *Penry v. Lynaugh*, 492 U. S. 302, 328, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (*Penry I*) (remanding for new punishment hearing without assessing harm).

further object to the verbal nullification instruction, when invited to do so by the trial court, waived his *Penry II* claim. *See* Maj. op. *supra* at 462 & n. 9.

It should go without saying that a defendant does not waive his right to assert a constitutional violation by failing to object at trial if, at the time of his trial, that right had not been recognized. *Ex Parte Taylor,* 484 S.W.2d 748, 752 (Tex.Crim.App.1972) (citing and explaining *United States v. Liguori,* 430 F.2d 842, 847 (2d Cir.1970)). Because *Penry II* had not been decided by the Supreme Court at the time of Smith's trial, it would have been a superhuman feat indeed to specifically object that the verbal nullification instruction itself was inadequate to remedy the *Penry I* problem in his case and why (that the nullification instruction creates a situation whereby jurors would face an intractable ethical dilemma).[3] Smith should not be faulted for failing to anticipate the action of the United States Supreme Court. *See Liguori,* 430 F.2d at 847. Thus, the majority's reasoning that Smith did not preserve error cannot be countenanced, and further, it is not supported by the record.

The record reflects that Smith brought the Eighth Amendment error to the attention of the trial court, that the trial court understood his objections, and his objections were made with the requisite specificity to preserve error under Texas Rule of Appellate Procedure. 33.1 and the cases construing it. For example, in two pre-trial motions, Smith argued that:

- the Texas death penalty "statutory scheme may become unconstitutional as applied if the defendant offers mitigating evidence about his background or character or

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[3] We recently held that the *Penry II* nullification problem was not recognized at the time of a similarly situated capital defendant's trial and remanded the cause to the convicting court for consideration of the claim. *See Ex parte Robertson,* AP-74,720 * 23 (Tex.Crim.App. March 16, 2005) (not designated for publication).

the circumstances of the crime that are not relevant to the special verdict questions or have relevance to the Defendant's moral culpability beyond the scope of the special verdicts" (citing *Penry I)* (Clerk's Record at 73-74);

- "Tex.Code Crim. Proc. is Ann. Art. 37.071 is unconstitutional because it does not provide for the introduction and subsequent use by the jury of mitigating evidence which is not relevant or material to the special issues. There is no provision in Texas for the jury to decide the appropriateness of the death penalty taking into consideration the personal moral culpability of the Defendant balanced by mitigating evidence which is not directly or circumstantially probative in answering the special issues. There is no provision in the current statutory scheme for the jury to render its verdict that the death penalty should not be inflicted because of mitigating evidence of this type." (Clerk's Record at 80).

The majority unfairly characterizes Smith's arguments as broad-based objections to the statutory scheme and the court's charge that no possible instruction could cure, and faults Smith for failing to offer suggestions to the trial court about how, in his view, the nullification instruction should be worded. To say the least, however, the state of the law concerning the special issues was in disarray at the time of trial, and the arguments Smith made pertaining to the special issues were clearly sufficient to apprise the trial court of his federal constitutional claim under *Penry I.* In declaring otherwise, the majority is merely splitting hairs to avoid applying the proper beyonda-reasonable-doubt standard[4] to his meritorious federal claim. *See Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App.1992) ("no technical considerations

[4] *Beathard v. State*, 767 S.W.2d 423,432 (Tex.Crim.App.1989).

or form of words" are required to preserve error for review, and straightforward communication in plain English will always suffice if it lets the trial judge know what the party wants and why he thinks himself entitled to it); Tex.R.App. P. 33.1. Whatever we require of lawyers in Texas with respect to the rules of error preservation, we should not hold that they must be clairvoyant. *See Liguori*, 430 F.2d at 847. Because *Penry II* had not been decided and there was no enactment by the Legislature in response to *Penry I*, this is exactly what the majority requires from this lawyer. The record reflects that counsel went above and beyond what was required of him to preserve error under Tex.R.App. P. 33.1 and Tex.Code Crim. Proc. Ann. art. 36.14.[5]

I also find compelling Smith's argument in reply to the State's new position that Smith did not preserve error. That is, if Smith had offered particular wording or a proposed charge on mitigation, and that instruction was later declared to be inadequate under the yet-to-be-decided *Penry II* case, Smith would have invited the error and no relief could have been subsequently granted to him because of his acquiescence to the error. *See* Applicant's Reply Brief on Remand at 3 n.*; (Reporter's Record Vol VI at 3-4). It is puzzling to me that the majority thinks the better course for trial counsel was, in this unique and difficult situation, to create an estoppel-type-invited-error problem himself by suggesting, at the invitation of the trial court, further changes to the nullification instruction. *See also* Tex.Code Crim. Proc. Ann. art. 36.14.[6]

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[5] Providing in part that "the defendant or his counsel shall have a reasonable time to examine the [proposed charge] and he shall present his objections thereto in writing, distinctly specifying each ground of objection. Said objections may embody errors claimed to have been committed in the charge, as well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts."

[6] The rule governing objecting to the charge provides that Smith was not required to do what the majority suggests he should have done. "[A]nd

Moreover, as this exchange reflects, the trial court understood Smith's motions as a request for a sufficient mechanism to allow the jury to consider and give effect to his mitigating evidence.

> The Court: The two motions to declare Texas Code of Criminal Procedure Annotated, Article 37.071, Section 3701 unconstitutional as applied, I read those and ... put them in my mind together. Is there anything not included in those two motions that you wish to supplement orally?
>
> Trial Counsel: No, Your Honor.
>
> Trial Court: Those will have to be denied.

Smith further explained the potential for error in his Motion to Reveal Mitigation Charge, "[s]ince . . . *Penry* the Texas Legislature has met in several sessions but has failed to address the problems and issues created by the decision . . . [and the] Court of Criminal Appeals has had numerous opportunities to address the problem raised in *Penry* and has failed to do so in any written opinion." (Clerk's Record 87-88). Thus, the record clearly reflects that Smith's arguments before the trial court, if not explicitly stating that the nullification instruction was an inadequate remedy to cure his *Penry I* complaint, they were precise enough to put the trial court on notice, particularly since there was no statute or case law to look to for guidance. *See Taylor v. State*, 939 S.W.2d 148, 154-55 (Tex.Crim.App.1996) (grounds of objection, while imprecise, were apparent from the context). The majority's reasoning to the contrary, utilizes an arbitrary and unfair "hair-splitting analysis" to bar consideration of Smith's claim on the merits. *See Lankston*, 827 S.W.2d at 909, 911

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in no event shall it be necessary for the defendant or his counsel to present special requested charges to preserve or maintain any error assigned to the charge," as herein provided. *See* Tex.Code Crim. Proc. Ann. art 36.14 (emphasis added).

(concluding that it was clear from context that both judge and prosecutor understood the defendant's objection).

Our state preservation of error laws may not be applied to avoid addressing substantive claims in violation of federal law. *See, e.g., Washington v. Texas*, 388 U.S. 14, 22-23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Nor do I believe that this court may attempt to avoid reversal by cloaking federal constitutional error or harm in purportedly "independent and adequate state law grounds." *See* Concurring op. *supra* at 472-73; *cf. Kunkle v. Texas*, 543 U.S. 1039, 125 S.Ct. 818, 160 L.Ed.2d 605 (2004) (Stevens, J., concurring) (noting that Supreme Court did not have jurisdiction to consider Kunkle's *Penry* claim because it was barred under an independent and adequate state ground, i.e., Tex.Code Crim. Proc. Ann., Art. 11.071, § 5). "Random or inconsistent application of state rules of procedural default will not be regarded as 'adequate and independent state law grounds' so as to bar decision in federal habeas review." *Ex parte Gardner*, 959 S.W.2d 189, 193 (Tex.Crim.App.1996) (Clinton, J., dissenting) (citing *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988)). Thus, contrary to the concurring judge's reasoning, *see* Concurring op. *supra* at 472-73, we cannot avoid federal review by now holding that Smith did not preserve error because "the question of when and how defaults in compliance with state procedural rules can preclude [federal court's] consideration of a federal question is itself a federal question." *See Henry v. Mississippi*, 379 U.S. 443, 447, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

Furthermore, a state procedural ground is not adequate unless the procedural rule is strictly or regularly followed. *Barr v. City of Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964). *Barr* is instructive on this point. In *Barr*, the Supreme Court declined the invitation to hold that Petitioners did not preserve error on their constitutional claims because the state supreme court "refused to pass on objec-

tions" as "the exceptions taken below were 'too general to be considered [.]'" *Id.* In reaching its decision that it was not barred from reviewing the state court's decision, the Court considered the state court's recent treatment of similar cases. *See id.* at 149-50, 84 S.Ct. 1734. Finding that the state court had addressed the merits in five cases, where either identical or similar objections were made below, the Supreme Court concluded it was not prohibited from reviewing the claims on the merits. *See id.*

Our application of error preservation rules, as of late, have been applied capriciously and arbitrarily by this court;[7] therefore, a self-proclaimed "adequate" procedural bar cannot insulate the majority's holding from federal review. *See Henry v. Mississippi*, 379 U.S. at 447, 85 S.Ct. 564; *Barr v. City of Columbia*, 378 U.S. at 149, 84 S.Ct. 1734. It appears to me that this court has been (and clearly is in this case) improperly applying procedural bars to avoid granting substantive relief to defendants who are perhaps guilty but are otherwise entitled to the relief sought. The rule of procedural default should not be used as an ad hoc mechanism to avoid reaching the merits of a particular case.

And perhaps more significantly, this Court has already addressed the merits of Smith's claim twice: once on direct appeal, *LaRoyce Lathair Smith v. Texas*, No. 71,333 *10-11

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[7] For example, this court has become more and more willing to apply procedural bars to substantive complaints that were clearly preserved in the trial court, particularly where the substantive claim had merit and the defendant, by all accounts, was an unappealing recipient of relief. *See, e.g., Keeter v. State*, 175 S.W.3d 756 (Tex.Crim.App.2005) (holding that *Keeter* did not preserve error on a *Brady v. Maryland* [373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)] claim, even though objection, written motion, and testimony were elicited before trial court in indecency with a child case); *Reyna v. State*, 168 S.W.3d 173, 176-77 (Tex.Crim.App.2005) (applying a "less common notion of error preservation" to indecency with a child case).

(Tex.Crim.App.1994) (not designated for publication), and also in our initial resolution of this very case. *See Ex parte Smith*, 132 S.W.3d at 416 (declining to impose procedural bar and addressing merits of Smith's claim); *see also* Maj. op. *supra* at 462 & n. 10 ("We rejected [Smith's direct appeal] claim and held that . . . the trial judge's supplemental instruction provided a sufficient vehicle for the jury to fully consider all of that evidence"); *see* Applicant's Reply Brief at 2 n. * (noting that the State has taken mutually exclusive positions throughout the case regarding error preservation). Because our holding was reversed by a higher court, a court which addressed the merits and found our holding on the merits to be erroneous, we may not now remedy the problem by failing to address the merits, and instead, decide that the substantive complaint was not preserved. *See United States v. Wells*, 519 U.S. 482, 487-88, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997) (acknowledging law of the case doctrine); *Granviel v. State*, 723 S.W.2d 141, 147 (Tex.Crim.App.1986) (same).

Obiter Dicta to Support Harmless Error

I disagree with the majority that it is arguable the Supreme Court did not "disapprove of" this Court's alternative holding "that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence." *See* Maj. op. *supra* at 457, 463. I believe the Supreme Court spoke quite clearly, holding, *inter alia*, that "just as in *Penry II* . . . findings of deliberateness and future dangerousness . . . had little, if anything, to do with the mitigation evidence [Smith] presented." *See Smith v. Texas*, 543 U.S. at 48, 125 S.Ct. 400.[8] Thus, there can be no reasonable conclusion that we were ordered to address anew

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[8] Because the Supreme Court has told us that Smith's mitigating evidence had little or no relation to the other special issues, the cases cited by the majority to support the contrary have no relevance to this proceeding. *See* Maj. op. at 465-67 & n. 34-37.

whether there was error. *See Penry v. Johnson*, 532 U.S. at 798, 121 S.Ct. 1910 (*Penry II*) ("we made clear in *Penry I*, none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to the evidence of Penry's mental retardation and childhood abuse"); *Penry v. Johnson*, 215 F.3d 504, 514 (Dennis, J., dissenting) (Penry's mitigating evidence was shackled and confined within the scope of the three special issues). While our initial conclusion may not have been expressly disavowed by the Supreme Court, it was implicitly rejected. Reversed means reversed. *Tennard v. Dretke*, 542 U. S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004).

The majority's reasoning on the question of error is *obiter dictum*, and therefore, has no precedential value. But it does serve the distinct purpose of allowing the majority to weave into its harm analysis the disavowed conclusion that the two special issues submitted sufficiently encompassed Smith's mitigating evidence. *See* Maj. op. *supra* at 472. However, our judicial power does not include the power to issue advisory opinions and ignore orders from the Supreme Court.[9] *Ex parte Ruiz*, 750 S.W.2d 217, 218 (Tex. Crim.App.1988).

The Proper Harm Analysis

Not only does the majority overstep its bounds by deciding a question it is not authorized to consider, *see id.*, it further commits error by applying a state-law non-constitutional harm analysis to federal constitutional error. Specifically, because the majority now suddenly thinks that Smith did not

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[9] Despite its recognition of the Supreme Court's conclusion that the nullification instruction here was more confusing to the jury than the state court assumed, the majority explains while it was "indeed a possibility" that the nullification instruction intensified the dilemma for ethical jurors, the record does not reflect that any juror, party, or the judge so expressed this notion on the record. Maj. op. *supra* at 468. This, however, does not mean that confusion did not occur in the jury room where it was most likely to happen.

preserve error in the trial court—despite the fact that the majority once rejected the procedural default argument and twice addressed his claim on the merits, the majority applies our burdensome state-law "egregious harm" analysis to Smith's Eight Amendment claim. *See* Maj. op. at 463-64; *Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App.19 84).

The majority's decision to apply our framework for unpreserved error in the jury charge is wrong for at least two reasons. First, simply because the manifestation of Smith's Eighth Amendment violation stemmed from the failure to include an instruction in a written jury charge, that Eighth Amendment claim does not therefore become a lesser state-law claim that we may dispose of under the less stringent standard of review for mere jury charge error. *Beathard v. State*, 767 S.W.2d at 432 (citing *Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) and explaining that the application of a state harmless-error rule is a state question when it involves only errors of state procedure or state law); *see also Jimenez v. State*, 32 S.W.3d 233, 236-37 (Tex.Crim.App.2000). Nor could we say, similarly, because the constitutional error was created by an omission in the jury charge, the proper review would be that reserved for non-constitutional errors. *See* Tex.R.App. P. 44.2(b) ("any [non-constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); *see also Almanza*, 686 S.W.2d at 171-72 (unpreserved error in the jury charge is reviewed for egregious harm).

Second, because the error *was* preserved, we should apply the harmless error standard in Tex.R.App. P. 44.2(a). *See Beathard v. State*, 767 S.W.2d at 432 (noting that our appellate procedure rule provides the same standard as the rule enunciated in *Chapman v. California, i.e.*, before federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt). Rule 44.2(a) provides that "If the appellate

record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." Because the error here was a violation of the federal constitution that did not amount to a structural defect, we must determine whether it was harmless beyond a reasonable doubt. *See Jimenez*, 32 S.W.3d at 237. The majority errs in failing to do this.

In finding no *egregious* harm under the state-law *Almanza* standard for errors in the written charge, the majority denies relief. Contrary to its analysis, it is of no moment to conclude that the two special issues embraced most of Smith's mitigating evidence. The Supreme Court held the nullification instruction was "constitutionally inadequate" to allow that evidence to be considered under the charge Smith received. This is particularly true since the Supreme Court indicated that most of the mitigating evidence was similar to Penry's mitigating evidence.

Smith v. Texas, 543 U.S. at 48, 125 S.Ct. 400 ("just as in *Penry II*," deliberateness and future dangerousness had little to do with the mitigating evidence Smith presented). In other words, it is not possible that the special issues adequately channeled Smith's mitigating evidence to the jury because the nullification instruction itself "intensified the dilemma faced by ethical jurors," and as a consequence, choked off at the source any ability to express a reasoned moral response to the evidence. Because there was no principled distinction between Smith's instruction and Penry's, all of Smith's mitigating evidence was "shackled and confined" within the scope of the special issues. *See id.* at 47-48, 125 S.Ct. 400.

Similarly, that Smith did not suffer egregious harm because of the well-presented argument and the jury's perception of the evidence (whether aggravating, double-edged sword, or mitigating), is beside the point because in the absence of a

vehicle—a proper mitigation question—the jury had no way to express its reasoned moral response to the *argument* in mitigation and the *evidence* in mitigation. In other words, even if the jury was persuaded by the "Dr. Jekyll" argument and the "Dr. Jekyll" evidence, *see* Maj. op. *supra* at 469, the jury could not give any consideration or effect to it because it had no way to do so.

Lastly, the majority improperly places the burden of proof on Smith to show harm. *See* Maj. op. *supra* at 472 (applicant fails to provide any persuasive argument that the jury was unable to consider the totality of his extensive mitigating evidence). As we said in *Ovalle v. State*, 13 S.W.3d 774, 787 (Tex.Crim.App.2000), no party should have the burden to prove harm from an error, as there is no way to prove "actual harm." Burdens and requirements of proving "actual facts" are appropriate in the law of evidence, but they have little meaning for the "harmless-error decision."

Conclusion

I would hold that, under the proper harmless error standard, Tex.R.App. P. 44.2(a), we must order habeas corpus relief. Based on the quantity and quality of Smith's mitigating evidence, to which the jury had no means to consider and give effect, I cannot say that the Eighth Amendment error was harmless beyond a reasonable doubt.

I respectfully dissent.

Respondent's Brief in the Supreme Court in *Penry II*
Excerpts: Summary of Argument and Sec. I.B

UNITED STATES SUPREME COURT
RESPONDENT'S BRIEF

No. 00-6677

JOHNNY PAUL PENRY,
Petitioner,

v.

GARY JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

February 15, 2001

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. Whether Penry's mitigating evidence was within the jury's effective reach under the instructions submitted at the punishment phase of trial.

2. Whether a report from a defense-requested, court-ordered psychiatric evaluation regarding an unrelated prior offense could be used by the State to rebut psychiatric evidence introduced by Penry at both phases of the trial.

* * * *

SUMMARY OF THE ARGUMENT

This case is not before the Court in the same posture as Penry I. Although bound by the special issues mandated by state statute, the trial court provided the jury with a supplemental instruction that clearly directed them to consider mitigating evidence and to give Penry a life sentence if they found that the evidence sufficiently lessened his moral culpability, regardless of the statutory special issues. The instruction was explained to the prospective jurors, collectively and individually, during voir dire, and defense counsel's closing remarks reminded the jurors in very simple terms how to apply the supplemental instruction. The jury was not instructed to disregard the law, the instructions, their oath, or the evidence. For these reasons, the lower court properly deferred to the state court's decision because the decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court.

Penry's Fifth Amendment rights were not violated by the admission of the Peebles report at the punishment phase of trial after Penry injected mental health issues at both phases of trial. The Peebles report was the result of a psychiatric

evaluation conducted more than two years before Penry murdered Pamela Carpenter at the request of Penry's own lawyer regarding an unrelated, non-capital charge. The report was admitted into evidence at the punishment phase of trial during cross-examination of Penry's expert witness on mental health issues after that witness testified that he had relied on the report in forming the opinions he had proffered to the jury on direct examination. The report was also proper rebuttal evidence to demonstrate that his IQ test results were not an accurate indicator of his mental abilities and that his violent behavior was attributable more to his anti-social personality than to his abusive background and alleged mental retardation. Finally, given that the sole "defense-damaging" portion of the report was cumulative to the opinions of a number of witnesses, including Penry's own expert witness, error, if any, was harmless.

B. There is no reasonable likelihood that Penry's jury interpreted the punishment phase instructions to preclude consideration of constitutionally relevant mitigating evidence.

In order to be entitled to relief on this claim, Penry must demonstrate a "reasonable likelihood" that the jury interpreted the punishment phase instructions to preclude consideration of constitutionally relevant mitigating evidence. *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (citing *Boyde v. California*, 494 U.S. 370, 380 (1990)); see also Pet. Br. at 12-13. The requirements of the Eighth Amendment are satisfied if the mitigating value of the evidence, as actually proffered at trial, is within the "effective reach" of the jury in responding to the punishment issues and instructions. *Johnson*, 509 U.S., at 368; *Graham v. Collins*, 506 U.S. 461, 475 (1993). "In evaluating the instructions, [a court should] not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would--with a 'commonsense understanding

of the instructions in the light of all that has taken place at the trial.'" *Johnson*, 509 U.S., at 368 (quoting *Boyde*, 494 U.S., at 381).

1. The charge clearly instructed jurors to consider Penry's personal moral culpability and to impose a life sentence, if warranted.

Penry's death sentence was based upon the jury's affirmative responses to the following three statutory punishment phase issues:

> (1) Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> (2) Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> (3) Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

JA 3:676-77. To make certain it cured the deficiency recognized by this Court's holding in Penry I—that the special issues, standing alone, were insufficient to provide a vehicle for consideration of the mitigating effect of Penry's evidence of mental retardation and abusive background, *Penry I*, 492 U.S., at 328—the trial court gave the following supplemental instructions:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on

> any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.
>
> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving mitigating effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

JA 3:674-75 (emphasis added).

Contrary to Penry's assertions, the instructions given in this case did not impermissibly limit the jury's ability to consider and give effect to his mitigating evidence. The trial judge specifically instructed the jury to consider Penry's personal moral culpability and then told the jury how to impose a life sentence, if warranted. The trial court told the jury to

simply answer one of the special issues "no" if it believed that mitigating circumstances made a life sentence an appropriate response to Penry's personal culpability. Further, the instruction did not specifically require mitigating evidence to fall under the literal language of the special issues, although much of Penry's mitigating evidence was relevant to the deliberateness prong of the first question. In any event, the instructions informed the jury how to give effect to mitigating evidence and impose a life sentence regardless of its initial answers to the questions. While the "as reflected by a negative finding" phrase in the final sentence was less than artful, the instruction as a whole adequately informed the jury how to impose a life sentence, if warranted.

There is no reasonable likelihood that the jury felt that it could not do that which the instructions specifically required. For the jury to believe that it could not give effect to mitigating evidence in the manner dictated by the charge would have rendered meaningless both the extensive mitigation instruction itself and the mitigating evidence that required it. See *Boyde*, 494 U.S., at 383 (finding jurors unlikely to construe instructions so as to transform defendant's presentation of "favorable testimony into a virtual charade") (citation omitted). The Court's core concern in Penry I, that "[t]he jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence," Penry I, 492 U.S., at 320, was satisfied in this case.

2. Any ambiguity in the charge itself was clarified by statements of the trial court judge, the prosecutors, and defense counsel.

Even if the language of the charge, standing alone, was ambiguous, when viewed "with a commonsense understanding of the instructions in the light of all that has taken place at the trial," *Johnson*, 509 U.S., at 368 (internal quotes and citation omitted), it is clear that Penry's jury could not

have felt precluded from giving mitigating effect to his evidence. Contrary to Penry's assertions that it was solely defense counsel who explained to the jurors how to apply the supplemental instruction, Pet. Br. at 20-21, the conduct of all the participants throughout the proceedings supports the conclusion that Penry's mitigating evidence was within the jury's effective reach.

During the initial group jury voir dire, the prosecutor specifically told the venire that jurors would be instructed to take mitigating evidence into consideration and:

> . . . if you feel like that [mitigating] evidence is strong enough that you feel like it would even warrant a lesser sentence than death . . . then you can answer one or more of these questions no, so that the defendant will receive a life sentence instead of the death penalty.

JA 1:9-10. The prosecutor followed up on this explanation during individual voir dire. For example, during the individual voir dire of William Franz, the first venire member ultimately selected to serve on the jury, the following exchanges occurred during the prosecutor's questioning:

> Q: . . . Now, this [supplemental] instruction . . . is almost like a fourth issue in that you will hear this other evidence that comes in about the defendant, and you will take that into consideration when you are answering these three [special issues], but you can also take that evidence independently, even if you felt like the answers to these three questions was yes, if you felt like there was something in the defendant's background that the death penalty would not be appropriate, pick them all out, or pick one of them out and answer no. Do you feel like you can do that?
>
> A: Yes.
>
> * * * *

Q: Now, if you are on this jury, and you look at the evidence like I have talked about on these three issues here, you look back at the facts of the crime and you believe that should be answered yes, and you look to the second one, you look at the facts and the defendant's background, you think that should be yes, and you look at, again, the facts of the case and you believe number three should be yes, but if then you look at the mitigating evidence and you felt like that because of this mitigating evidence that the death penalty wouldn't be appropriate, if you felt like that indeed somehow the defendant's blame to this offense was reduced, could you then answer one of these issues no and in effect give the defendant a life sentence?

A: Yes, I could.

Q: Because that is what you would be sworn to do, and if you felt that way, you would be sworn to do that, and I just want to make sure that you can.

A: Yes.

Q: The other side of the coin is if you answered these three issues yes, and if you looked at this instruction and you weighed that mitigating evidence, if you decided in your mind that this mitigating evidence did not lessen the blame or did not lessen it to the extent that the death penalty would be inappropriate, if you just didn't think the mitigating evidence was strong enough, could you still answer these three issues yes, and in fact give the defendant a death sentence?

A: Yes, sir, I do.

R18:854-55, 866-67. The voir dire questioning of the remaining venire members ultimately selected to decide this case, see Tr 3:774 (list of jurors chosen), reflects similar comments from the prosecutor and the trial court regarding the supplemental instruction. In each case, the supplemental instruction was exhibited and explained to the venire member, and any confusion arising from a venire member's initial ex-

posure to the instruction was addressed until resolved. R.18:966-67, 980-81, 990 (Lloyd Davis); R.20:1287-88, 1315, 1318, 1321-22 (Gary McClure); R.22:1764-65, 1787, 1790-92 (David Moreno); R.23:2004, 2025-26, 2036-37 (Forest Marler); R.23:2144-45, 2168, 2171 (Mary Yarbrough); R.26:2751-52, 2776-77 (Machere Gillaspie); R.27:2901-02, 2930-31, 2942- 43 (Thomas Roberts); R.28:3330-31, 3359-62 (Earl Fountain); R.32:4466-67, 4481-86, 4488 (Diane Wood); R.34:344-45, 359-60 (Douglas Massey); R.35:751-52, 768- 69, 774 (Mark McElligott); see also defense counsel questioning at R.18:1018; R.20:1397; R.23:2224; R.26:2800, 2841; R.27:2947, 2952-53, 2955, 3012-13; R.28:3386-87; R.32:4556-58, 4562; R.34:418.[3]

During closing arguments, at no time did the prosecutors argue that the jury could not or should not vote "no" on a special issue unless Penry's evidence was directly relevant, in a mitigating fashion, to one of the three special issues. To the contrary, when prosecutors discussed mitigating evidence during punishment phase summations, they focused on the fact that Penry's violence was not attributable to alleged mental retardation and childhood abuse and, therefore, his blameworthiness and culpability were not reduced.[4] See, e.g.,

---

[3] The supplemental instruction ultimately given was identical to the sample supplemental instruction exhibited during voir dire with the exception that the voir dire exhibit concluded with "a negative finding should be given to that special issue under consideration" as opposed to "a negative finding should be given to one of the special issues." See JA3:723-24. At trial, Penry called the change a "slight improvement to the Charge." R.50:1812.

[4] Penry's claim of mental retardation was vigorously disputed by the State at trial. Penry's claim of childhood abuse was not as vigorously disputed. For example, during closing arguments, while the prosecutors did not dispute that Penry had been abused and had suffered a "bad childhood," they asked the jury to consider whether testimony regarding the extent of the alleged abuse was credible. JA 3:604-08, 610-11, 615, 661-64.

JA 3:611-17, 664-67.

Consistent with the remarks of the trial court and the prosecutor during voir dire, defense counsel's closing remarks reminded the jurors in very simple terms how to apply the supplemental instruction in determining the appropriate punishment:

> Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you['ve] got to answer one of those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct answer is yes. Not the easiest instruction to follow, and the law does funny things sometimes, but, it is what it says, and I have taken all this time with you to make sure you understand what it says.
>
> If you think that because of this mitigating evidence the man deserves a life sentence, then, there has got to be a no on that verdict sheet somewhere.

JA 3:640.

This case does not present facts "materially indistinguishable" from Penry I, and the state court's decision that Penry's jury possessed an adequate vehicle for consideration of mitigating evidence was not objectively unreasonable. All the parties were operating on the same permissible understanding of the mitigation instruction, and the instruction specifically directed the jury to answer any special issue "no" if it believed mitigating evidence called for a life sentence. There simply is no reasonable probability that the jury misinterpreted the instruction to preclude consideration of constitutionally relevant mitigating evidence.

Order Granting Certiorari

SUPREME COURT OF THE UNITED STATES

No. 05-11304

LAROYCE LATHAIR SMITH,

Petitioner,

v.

TEXAS.

Oct. 6, 2006

Case below, 185 S.W.3d 455.

Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Court of Criminal Appeals of Texas granted.

(5)

No. 05-11304

FILED
NOV 20 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

JOINT APPENDIX VOLUME II

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001
PETITION FOR A WRIT OF CERTIORARI FILED MAY 30, 2006
CERTIORARI GRANTED OCTOBER 6, 2006

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WHITE — Central Administration
CANARY — Local Building
PINK — Appraisal Team

dallas independent school district

Student's Name LaRoyce Smith Birth Date 4 (Month) 23 (Day) 71 (Year)

Student Identification # 507954 Adaptive Education # 53817

School Information

When did this child enter DISD? 8-23-76 KINDEGARTEN (Year or Grade Level)

Previous schools, if any

Grades repeated, if any

Test Information

Metropolitan Readiness Test 9-76 (Date) 7 (% ile Rank)

DEFENDANT'S EXHIBIT 38

Mental Maturity (CTMM)

Date	LFIQ	NLFIQ	TMFIQ

Achievement (CAT or CTBS)

Date	RV	RC	TR	LM	LE	Sp	TL	A Comp	A Con	A Appl	TA	TB	SSR	SSG

Other:

Spache Reading Test: ____ (Date) Word Rec. ____ Oral ____ Silent ____ Listening ____

Describe academic performance or progress and school attendance Attendance regular - performance nil - progress nil - Very low retention - has not learned all letters - cannot read simple words - cannot perform number functions beyond counting - good speech - fair handwriting. Does not know address, birthdate -

Observed interaction with peers Fair interaction with peers - Is a little rough but enjoys his friends - Must be kept seperated from a few because he's easily led into trouble

Observed interaction with teachers or other school personnel Very hesitant to respond to teacher's questions or requests. Speaks in whispers. Tries to control actions at teacher's request but sometimes fails. Has recieved corporal punishment twice.

Principal Date (Mo. Day Yr.)

Nancy Adrian (Teacher or Counselor) Date 4-14-78 (Mo. Day Yr.)

Form SE-33 — 10M — 2165 — 73

DEFENDANT'S EXHIBIT NUMBER 40

WHITE COPY — Special Education
CANARY COPY — Building Nurse
PINK COPY — Health Services

dallas independent school district

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

10/6/78
Date

Name of Student: LaRoyce Smith Sex Male

Birth Date: 4 23 71 Ethnic Group: Black

School: T.G. Terry Elementary

Dear Parent:

We are attempting to determine if your child needs special help in school. Part of the information considered in this determination is the health of your child. It will be necessary for you to take him (her) with these papers to your physician or clinic for a medical evaluation. Please sign the release form below granting the doctor permission to report his findings to my office.

To the Physician:

We would greatly appreciate the report of your medical evaluation. You are requested to mail the information on the enclosed form to my office.

This information will help us to determine the proper school placement for this child.

Sincerely yours,

R M Adams M.D.

Richard M. Adams, M. D.
Director — School Health Services
Dallas Independent School District

Release: I hereby grant permission for you to report your findings to Richard M. Adams, M. D., Director, School Health Services, Dallas Independent School District, 3700 Ross Avenue, Dallas, Texas, 75204.

_____
Signature of Parent or Guardian

WHITE COPY — Special Education
CANARY COPY — Nursing Nurse
PINK COPY — Health Services

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

Name of Child La Royce Smith Date of Examination 11/17/

To Be Completed by Physician

MEDICAL HISTORY	Negative	Positive	Describe Fully Any Positive Findings
			CC. SLOW GROWTH x 1yr. 7 lbs 3 oz by Informant Mother to school RN Interview
Current Health Problems			dry skin behind ears + some times on face seasonal (Summer + fall) # 2nd 3 siblings
Significant Past History (Birth, Development, etc.)			9-10 mo gestation c neonatal DIOD. Mec. Cons. during labor of 7 hours. Child was discharged with mother noting abnormal condition "shock muscles" 2 days 3 mo. dis.
Review of Systems			Born at St. Paul Hosp. Wt. 6 lbs 12 oz Resp. prob. Toilet @ 18-24 mo. Talked @ 9 mo. Walked @ 10 mo. @ 3 yrs was seen at Scottish Rite Hosp. for genu valgum. treated by braces (nightly)
Pertinent Family/Social History			Systems OK MO. has hypertension had been on Rx Fr. has seasonal allergies mat. gr mo. has diabetes, 2nd cousin has sickle cell anemia Pat. gr MO died of CA

PHYSICAL EXAMINATION

HEIGHT	WEIGHT	10/17 VISION				HEARING 9/27	
		Without Glasses		With Glasses		Right	Left
50 in. / cm.	66 lbs. / kg.	Right	Left	Right	Left	P	P
50 % ile	90 % ile	20/25	20/20	20/	20/	Method Used:	Finger Voice

GENERAL	Normal	Abnormal	Not Examined	
				B.P. 90/60 P 92 R____ Head circumference: 53 cm. (60 % ile)
Head	✓			
Eyes:				
Pupils	✓			
Fundi	✓			
Muscles	✓			
Ears	✓			
Nose-Throat	✓			RHINORRHEA
Teeth	✓			CARIES
Lungs	✓			
Heart	✓			RR 5 GOOD BC (II) PULSES 2+ = BRAT

WHITE COPY — School Education
CANARY COPY — Building Nurse
PINK COPY — Health Services

amp

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

Name of Child La Royce Smith Date of Examination 12/6/17

To Be Completed By Physician

	Normal	Abnormal	Not Examined	Describe Fully Any Abnormal Findings
GENERAL *(Continued)*				
Genitalia and Abdomen	✓			
Bone-Joint . Muscle	✓			
Skin	✓			
NEUROLOGICAL				
Orientation	✓			
Cooperation	✓			
Behavior	✓			
Gait/Balance	✓			
Coordination:	✓			
Gross	✓			
Fine	✓			
Sensory	✓			
Reflexes	✓			2+ = Bilat. ⊖ Babinski
Cranial Nerves	✓			
Speech	✓			

Please circle:

1) This patient (does; does not) have evidence of seizure disorder, significant hyperactivity or progressive neurologic disease.

2) This examination (does; does not) suggest the presence of static neurologic deficit or developmental delay.

Explanation: _____

WHITE COPY — Special Education
CANARY COPY — Building Nurse
PINK COPY — Health Services

HISTORY AND PHYSICAL EXAMINATION

amp

SCHOOL HEALTH SERVICES

Name of Child LaRoyce Smith Date of Examination 10/6/75

MEDICAL DIAGNOSIS: ① SLOW LEARNER by Hx - ? NEUROLOGICAL CONDITION AS NOTED
RECOMMENDATIONS: ② CURRENT ③ NO LIMITATIONS FOR PHYS. ED. NOTED AT THIS TIME.

Educational Implications: ☑ Yes ☐ No

Explanation: _____

Will follow-up be needed?
☐ Yes ☑ No

When? _____

Chas Mendez PA Signed R M Adams M. D.
(Physician)

_____
(Name Printed)

_____
(Address)

_____ _____
(Zip Code) (Telephone)

Thank you for providing this information. It will be helpful in making the appropriate recommendation for school placement.

Sincerely yours,

R M Adams M. D.

Richard M. Adams, M. D.
Director — School Health Services
Dallas Independent School District

DEFENDANT'S EXHIBIT NUMBER 41

MAY 1981

amp

2.0

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team
GOLDENROD — Parent

dallas independent school district

REFERRAL FOR INDIVIDUAL STUDY

Comprehensive Appraisal Services

Student Services No. 53817 Date Received _____ (Month / Day / Year)

Student Identification No. 507954

Name of Pupil Smith, La Royce (Last / First / Middle) Birth Date 4-23-71 (Month / Day / Year)

Father LeRoy Smith Mother Johnnie Smith

Child Lives with Parent (Relationship) Address 7427 Brierfield

Father

Name _____ (If other than parent) Telephone: Business _____ Home 224-7690

Mother 323-6000/6934

School T. G. Terry Grade 3

ETHNICITY						SEX	
1 A	2 (N)	3 MA	4 IND	5 OR	6 OTH	1 (M)	2 F

Language used in the home is primarily: (1) English 2 Spanish 3 Other (Circle One)

PARENTAL AUTHORIZATION AND CONSENT

The purpose of this request for Student Services has been discussed with me. I understand that the following services may be required:

1. ✓ Classroom observation
2. ✓ Educational appraisal
3. ✓ Speech and language evaluation
4. ✓ Family and individual background and adaptive behavior
5. ✓ Psychological appraisal
6. ✓ Medical specialty consultation mother wants DISD to do the Physical
7. ✓ General medical evaluation: vision and hearing testing
8. ✓ Physical therapy and/or occupational therapy evaluation
9. ✓ Other any of these as needed
10. ✓ Consideration for Special Education placement

Date: 4-27-81

Norwood King
DISD Professional Personnel Securing Authorization

X Johnnie Smith
Parent or Legal Guardian

PERMISSION TO REQUEST PERTINENT INFORMATION

Permission is granted to Student Services to request pertinent information, such as

____school records, ____medical records, ____sociological records, ____psychological

and/or psychiatric reports of _____ (Student's Name)

from: _____ (Name of Agency) _____ (Address) _____ (City) _____ (State) _____ (Zip)

Date: _____ _____ (Signature of Parent or Legal Guardian)

4-27-81
DATE

53817
Student Services Number

TIME

dallas independent school district

DEVELOPMENTAL AND SOCIOLOGICAL INFORMATION

I. IDENTIFYING INFORMATION:

La Royce Smith	4-23-71	M	N	3	T.G. Terry
Name of Child	Birthdate	Sex	Race	Grade	School

LeRoy Smith	Vacuum Heat Treat	357-0394	Truck Driver
Father's Name	Employer	Job Title	Phone
Johnnie Smith	Mostek	assembler supervisor	323-6934
Mother's Name	Employer	Job Title	Phone
Step-Father	Employer	Job Title	Phone
Step-Mother	Employer	Job Title	Phone
Parents	7427 Brierfield		224-7690
Child lives with	Address		Phone

How many languages are spoken in the home? 1 The language most spoken in the home? English

Are the parents separated or divorced? No When? _____ Who has legal custody of the child? Parents Describe the child's contact with the absent parent. _____

List the names of all family members beginning with the oldest.

	NAME	BIRTHDATE	SEX	GRADE IN SCHOOL NOW	HIGHEST GRADE COMPLETED/ -TECHNICAL TRAINING
Father	La Roy Smith	9-23-43	M		11
Mother	Johnnie Smith	2-20-43	F		12
CHILDREN	Myron Wilson	8-28-61	M		12
	Norvetta Smith	12-16-77	F		

II: PROBLEMS AS SEEN BY PARENTS:

Please describe what you believe your child's problems and concerns are: He is slow and has difficulty remembering what he has learned

Has your child every repeated a grade? yes Which grade? 1st

If you child was absent more than 10 days last year or this year, what were the reasons? illness

Describe any special program or special education class that your child has been involved with. —

Please describe how your child spends time at home. He likes to play a lot, mostly outside

Does your child tire easily? yes. When playing, he will stop and rest after

Does your child seem overactive? yes Have difficulty paying attention? yes

What does your child do to get attention? He bothers his sister, makes noises, etc. He is an affectionate child and likes for you to notice him

Describe the circumstances in the home which might affect your child's school performance. Both parents are working and do not give him enough of their time

In the home, who is responsible for most of your child's discipline? Mother

What is the most effective means of discipline you have found for this child? Nothing works best. If you spank him, he is back to normal in a few minutes. If you send him to his room, etc., he will entertain himself for some

When punished (scolded), how does your child react or behave? When spanked, he may cry a little

BEST AVAILABLE COPY

III. COGNITIVE DEVELOPMENT (Begin questions at or near child's chronological age).

Behavior:

	Year	Yes	No
Smiles when she/he sees a familiar face	0 - 1		
Drops and picks up toy	0 - 1		
Finds object (toy) hidden under container	0 - 1		
Points to one body part	1 - 2		
Points to self when asked "Where is Name?"	1 - 2		
Scribbles	1 - 2		
Copies a circle	2 - 3		
Names objects that make sounds	2 - 3		
Points to big and little upon request	2 - 3		
Points to boy and girl on verbal demand	3 - 4		
Tells if object is heavy or light	3 - 4		
Counts to 3 in imitation	3 - 4		
Copies triangle on request	4 - 5	✓	
Names 8 colors	4 - 5	✓	
Counts by rote 1-20	4 - 5	✓	
Names left and right on self	5 - 6	✓	
Says letters of alphabet	5 - 6	✓	
Names days of week in order	5 - 6	✓	
Remembers holidays and special events	6 - 7	✓	
Knows phone number or address	6 - 7	✓	
Recognizes danger signs	6 - 7	✓	
Makes correct change for $1.00	7 - 8		✓
Reads comics, magazines, books	7 - 8	some	
Initiates games	7 - 8		✓
Saves money for special purchases	8 - 9		✓
Belongs to "Clubs" or has "Best friend"	8 - 9	Best friend	
Goes to movies, ball games, etc. with other friends	8 - 9	✓	
Runs errands, takes messages	9 - 10	✓	
Plans vacation activities (ahead of time)	9 - 10	✓	
Uses a pay telephone	9 - 10	✓	

IV: LANGUAGE DEVELOPMENT:

Does your child have any difficulty in speaking? Yes _____ No ✓

If yes, describe. _____

Is your child able to express verbally his/her needs and desires? yes

Is your child's speech marked by any long pauses, repetitions, or difficulty getting words out? no

Does your child have difficulty in making you or anyone else in his/her environment understand him/her? no

Does your child appear upset when he fails to make himself understood? yes

Does your child seem to have difficulty paying attention? yes

Have you every suspected a hearing problem? no

V: PERSONAL DEVELOPMENT:

Describe your feelings and attitudes about this pregnancy and birth.

mother had high blood pressure and went into convulsion before and during delivery.

What was your age with this pregnancy? 28

Have you every had a miscarriage? Yes ✓ No _____ When? Before La Royce

Was this a full-term baby? Yes

Birthweight 6 lbs. 12 ozs.

Were you in labor longer than 10 hours? no

Were there any feeding problems or illnesses during the first months of life? He was very nervous at birth and had difficulty digesting his formula for three or four months

VI: DEVELOPMENTAL TASKS:

Tell me about your child's motor development Normal

Is your child's balance and coordination as good as other children the same age? Yes

Tell me when your child first:

Crawled He didn't crawl

Walked without help 11 Mo.

Was toilet trained 2 yrs.

Describe the kind of physical activity you allow your child to do at home: Whatever is normal for children his age

Tell me about your child's eating habits. He eats good

When did your child begin to feed him/herself independently? 12 Mo.

Does the family often eat together? No

Has your child had a recent weight loss or gain? No, but he is overweight

Does your child often skip breakfast? No

Does your child:

Use appropriate utensils when eating? Normal

Prepare his/her own sandwich?

Help clear the table?

Use knife for spreading?

Pour from a pitcher?

Use napkins?

Stab food with fork?

Tell me about your child's activities one hour before bedtime. Watching TV

Does your child have difficulty sleeping? No, but he talks a lot in his sle
(Nightmares, sleepwalking, etc.)

Does your child need medication to sleep? No If yes, what is taken? _____

Does your child get at least 8-9 hours sleep each night? Yes

Is your child in the habit of thumbsucking at bedtime? No

Are your child's bowel-bladder habits normal? Yes

VII: FAMILY RULES:

YES	NO	
✓		Has regular routine chores? What are the chores? He helps with housework
		Are these completed? ✓
✓		Has limits on TV viewing?
✓		Has regular study time 3:30 PM Where? at the breakfast table
✓		Returns home from school at a set time? 3:00 P.M.
✓		Has a set time to come home at night?
✓		Is allowed to play anywhere in the neighborhood?
	✓	Is allowed to date?
✓		Cooperates with adult requests 75% of the time?
✓		Asks permission to use objects belonging to others 75% of the time?
✓		Joins in conversation at mealtime?
	✓	Participates in social activities? Not at the present time
✓		Has regular bedtime. 9:00 P.M.

VIII: CHILD'S FAMILY:

Has anyone else in your family had any learning problem or difficulty in school? no

Describe your child's relationship with other family members. Good

Please describe the activities that your family participates in or on a regular basis. Picnics, etc.

Which members of the family no longer live at home? —

List names of other family members or friends living in your home. —

Which member of your family does your child look up to the most? Mother

Do you have a concern about drug or alcohol use in your home or community? —

Have family members been involved in counseling (psychological, psychiatric?) no

Are there any health problems which have been passed from one generation to another?

(Diabetes, Sickle Cell etc.) Mother is diabetic

IX: FAMILY'S EDUCATIONAL EXPECTATIONS:

What are the goals for your child in terms of education? (This is not to be interpreted as a commitment.)

To be able to learn and cope with this world

Language: _____

Learning: _____

Socialization: _____

Physical Education: _____

Vocational: _____

Behavioral: _____

x Johnnie Smith
Signature of person providing information

ADAPTIVE BEHAVIOR SCALE ADMINISTERED:

VINELAND Yes _____ No _____
date

SOMPA Yes _____ No _____
date

OTHER Yes _____ No _____
date

Norwood King
Home-School Coordinator

*COMMENTS: _____

*To be used by person supplying information and/or Home-School Coordinator

DEFENDANT'S EXHIBIT NUMBER 42

WHITE — Permanent File
CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

Part.

4.0
Page 1 of 4

JUN 9 1981

dallas independent school district

ARD/IEP COMMITTEE REPORT

1981

Note: Record deliberations on 3.0

Date 5-20-81

Name Tr Lisa Smith

Student Services No. 53817

D.O.B. 4-23-71

Identification No. 507954

Purpose of Meeting: Initial Eligibility/Entry ✓ Annual Review ____ Other (Specify) ____

Notice of meeting sent to parents by School Date 5-9-81

Parents provided copy of Parents and Students Rights for Special Education by
Home School Coordinator Date 5-20-81

REVIEW OF INDIVIDUAL EVALUATION: The following attached reports were reviewed (note date of report)

Medical 10-6-78 Psychological 5-6-81 Educational 5-6-81 Sociological 4-27-81
Vision 1-28-81 Hearing 1-29-81 Speech 5-81 Adaptive Behavior ____
Occupational Therapy ____ Physical Therapy ____ Other ____

Review of assessment data indicates the presence of a physical, mental, emotional or speech disability:
Yes ✓ No ____

Check the handicapping condition(s) the committee found applicable:

( ) Orthopedically Handicapped
( ) Other Health Impaired
( ) Auditorially Handicapped
( ) Visually Handicapped
( ) Deaf-Blind
( ) Mentally Retarded
( ) Emotionally Disturbed
(✓) Learning Disabled
(✓) Speech Handicapped
( ) Autistic
( ) Pregnant

If multiply handicapped, specify: Primary L.D. Secondary Speech

Review of assessment data indicates the (✓) presence ( ) absence of significant educational need. A report of student's specific learning competencies has been provided and reviewed by the ARD/IEP Committee: Yes ✓ No ____

INDIVIDUALIZED EDUCATION PROGRAM:

Current Educational Competencies (Functioning Levels) (Each area must be addressed)

List grade level or functional level for academic areas, pre-academic development or other areas of development:

Reading - grade level 1.8 - 2.4
Writing ability - grade level abilities
Arithmetic - grade level -

Physical abilities/disabilities which would affect participation in instruction and/or P.E.:

- none

Behaviors demonstrated which would affect educational programming:

Sometimes forgetful or daydreams, needs structure and supervision to stay on his work sometimes. Very out-going, eager to learn, easily motivated.

Skills demonstrated which may be prerequisite to participation in vocational education (if applicable): N/A at this age

...manent File
... — Parent/Guardian
... — Local School
...OLDENROD — Other

ARD/IEP COMMITTEE REPORT

Date 5/20/81

Name La Royce Smith I.D. No. 507954 Student Services No. 53817

ANNUAL GOALS: Address all areas that apply to the student's educational needs: Academic or Pre-academic (Language Arts, Math, other); Physical Education; Behavioral (Personal, Classroom, Social); Speech; Vocational; other

Increase reading comprehension to level 2.1

INSTRUCTIONAL SERVICES

	Subjects	Hrs/Wk	Beg.	End	Person Responsible
(✓ Regular	Math	5/WK	8/81	5/82	Reg. Teacher
	Science	3/WK	8/81	5/82	"
	Art	2/WK	"	"	"
	Music	3/WK	"	"	"
	Physical Ed.	2/WK	"	"	"
(✓ Special Ed	Language Arts	5/WK	"	"	"
	Social Studies	5/WK	"	"	"
	Reading	5/WK	8/81	5/82	Resource Teacher
(✓ Speech	Speech Therapy	1/WK	9/	5/80	Speech Clinician

( ) Vocational Education for Handicapped

Vocational Career Field

Cooperative Work Training

Describe specialized building modifications, personnel and instructional/adaptive equipment needed to implement the child's program:

N/A

PLACEMENT DECISIONS:

Level of Instruction: ( ) Pre-elementary (✓) Elementary ( ) Middle School ( ) Senior High

Campus Location: Type of Special Class Resource Room

...anent File
...Y – Parent/Guardian
...K – Local School
GOLDENROD – Other

ARD/IEP COMMITTEE REPORT

amp JUN 9 1981

Date 5/20/81

Name La Royce Smith I.D. No. 5C7954 Student Services No. 53817

RELATED SERVICES:
Describe related services to be provided to implement goals:

	Beg.	End	Person Responsible
( ) Transportation (Specify any needed adaptations)			
(✓) Other Speech Services	5/81	5/82	Speech Clinician

In brief narrative form, give justification for each service provided:

It is the opinion of the members of the committee that this child has not been placed in Special Education on the basis of: 1) only deficiencies identified as directly attributable to a different cultural life style, or to not having had education opportunities, or to not having achieved from previous educational experiences or 2) criteria which were developed solely on the command of the English language (for national origin, minority or linguistically different students only).

SIGNATURES OF THE COMMITTEE MEMBERS

I agree with decisions	I do not agree with all decisions (Comments must be attached)	Signature	
✓		Daniel Ray	Chairman/Administrator
✓		Johnnie Smith	Parent/Guardian
✓		Virginia A Phelps	Educational Liaison
			Diagnostician
✓		Norwood King	Home/School Coordinator
✓		Bethany H Vinis	Psychological Associate
			Health Professional
✓		Tammy Vinis	Special Education Teacher
✓		Pat Middleton	Speech Clinician
			OT/PT
			Representative of Visually Handicapped or Deaf Education
			Student
			Vocational Teacher
			Counselor
			Other

If parent or guardian was not present, designate person to follow-up with parent contact:

DEFENDANT'S EXHIBIT NUMBER 43

WHITE COPY — Special Education
CANARY COPY — Building Nurse
PINK COPY — Health Services

MAY 2 3 1981 Page 1 of

XX

dallas independent school district

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

Date

Name of Student: Smith Albert Sex M

Birth Date: 04-23-71 Ethnic Group: B

School: T. L. Hill

Dear Parent:

We are attempting to determine if your child needs special help in school. Part of the information considered in this determination is the health of your child. It will be necessary for you to take him (her) with these papers to your physician or clinic for a medical evaluation. Please sign the release form below granting the doctor permission to report his findings to my office.

To the Physician:

We would greatly appreciate the report of your medical evaluation. You are requested to mail the information on the enclosed form to my office.

This information will help us to determine the proper school placement for this child.

Sincerely yours,

R M Adams M.D.

Richard M. Adams, M. D.
Director — School Health Services
Dallas Independent School District

Release: I hereby grant permission for you to report your findings to Richard M. Adams, M. D., Director, School Health Services, Dallas Independent School District, 3700 Ross Avenue, Dallas, Texas, 75204.

See 2.0.

Signature of Parent or Guardian

WHITE COPY — Special Education
CANARY COPY — Building Nurse
PINK COPY — Health Services

HISTORY AND PHYSICAL EXAMINATION amp

SCHOOL HEALTH SERVICES

Name of Child Smith Jackie J. Date of Examination 9-15-8

Grade 3C Entrance Interim Periodic

MEDICAL HISTORY	Negative	Positive	Describe Fully Any Positive Findings
Current Health Problems		✓	O.C. Hearing & x 3 years. Hx. of recurrent allergic rhinitis. (Chronic) Last seen by this doctor 3/81 for recheck. Takes Rx meds. as a needed basis.
Significant Past History (Birth, Development, etc.)		✓	9 mos. Isolation & Neonatal death Convulsion during fever & trauma. Frontal & occip. HA. Recent hem. and nasal bleeding before this hospitalization.
Review of Systems		✓	Immunizations up to date. Last PPD 6/81 12 mm. Para III Grandfather TB 30's Last chest x-ray 3/81 at child health conf.
Pertinent Family/Social History		✓	Child lives w/ Mother & Father & younger brother. Mother works as nurse. No. nurse's baby. Appetite O.K. Hx. of tonsillectomy & adenoidectomy 1/81 for recurrent tonsillitis. Recent family stress. Parents divorced. Father lives in home for [illegible] Adenoids regrown.

PHYSICAL EXAMINATION

HEIGHT	WEIGHT	VISION 1/81				HEARING 1/81	
		Without Glasses		With Glasses		Right	Left
55 1/2 in. / cm.	69 1/2 lbs. / kg.	Right 20/ 30	Left 20/ 30	Right 20/	Left 20/	15/20	15/20
50 % ile	98 % ile					Method Used:	Whisper

Head circumference: [redacted] cm. 54

([redacted] % ile) 50

B.P. 110/70 P 88 R ___

GENERAL	Normal	Abnormal	Not Examined	
Head	✓			
	✓			[illegible]
Eyes: Pupils	✓			
Fundi	✓			
Muscles	✓			
Ears	✓			
Nose-Throat		✓		mouth breathing
Teeth	✓			Amalgam fillings
Lungs	✓			[illegible]
Heart	✓			

To Be Completed by Physician

WHITE COPY — Special Education
CANARY COPY — Building Nurse
PINK COPY — Health Services

asp

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

Name of Child [illegible] Date of Examination 9-15-8

To Be Completed By Physician

	Normal	Abnormal	Not Examined	Describe Fully Any Abnormal Findings
GENERAL *(Continued)*	✓			[illegible]
Genitalia and Abdomen	✓			[illegible]
Bone-Joint Muscle	✓			[illegible]
Skin	✓			[illegible]
NEUROLOGICAL				
Orientation	✓			[illegible]
Cooperation	✓			
Behavior		✓		[illegible]
Gait/Balance	✓			[illegible]
Coordination:				
Gross		✓		[illegible]
Fine	✓			[illegible]
Sensory	✓			[illegible]
Reflexes	✓			[illegible]
Cranial Nerves	✓			
Speech			✓	[illegible]

Please circle:

1) This patient (does/~~does not~~) have evidence of seizure disorder, significant hyperactivity or progressive neurologic disease.

2) This examination (does/~~does not~~) suggest the presence of static neurologic deficit or developmental delay.

Explanation: presence one soft sign

Form [illegible]

WHITE COPY – School Registrar
CANARY COPY – Building Nurse
PINK COPY – Health Services

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

Name of Child [illegible] Date of Examination 9-15-81

MEDICAL ~~DIAGNOSIS~~: IMPRESSION: (1) L. Problems by hx
(2) Allergies by hx ? wind dust, atopic skin
RECOMMENDATIONS: (3) Sl. fatty obese, wt 98% for ht/age
(4) Eye PE (5) Postop neuro & cog expectancy: behavior,
presence one soft sign, High risk factors include
Educational Implications: ☐ Yes ☐ No maternal diabetes & convulsion during labor, infant
& extended hospital stay.

Explanation:

Possible Organic cause for learning problems –
see # (5)

Will follow-up be needed?
☒ Yes ☐ No

When? PRN

School PN F/U
Inch line & CNO's pts,
see # (3)

Signed R M Adams M.D.
(Physician)

RMADAMS MD
(Name Printed)

3700 Ross Ave Dallas, Tx.
(Address)

75204 824-1620
(Zip Code) (Telephone)

Thank you for providing this information. It will be helpful in making the appropriate recommendation for school placement.

PATRICIA McDONALD, R.N.—C.
SCHOOL NURSE PRACTITIONER
DISD. — 3700 ROSS AVE.
824-1620 EXT. 497

Sincerely yours,

R M Adams M.D.

Richard M. Adams, M. D.
Director — School Health Services
Dallas Independent School District

DEFENDANT'S EXHIBIT NUMBER 44

ARD/IEP COMMITTEE REPORT

Date 2/19/82

.me La Royce Smith I.D. No. 507754 Student Services No. 53?

ANNUAL GOALS: Address all areas that apply to the student's educational needs: Academic or Pre-academic (Language Arts, Math, other); Physical Education; Behavioral (Personal, Classroom, Social); Speech; Vocational; other

Baseline: 5/82 Peabody PVT-R demonstrated a 3 year, 6 month deficit as compared to chronological age in the area of receptive vocabulary skills. The TOLD also demonstrated the same measurable deficit and also indicated a severe deficit in grammatic completion. A 2 year deficit was demonstrated in oral language.

Annual Goals: 1) To raise La Royce's receptive and expressive vocabulary by one year as determined by post testing of above mentioned test. 2) To improve La Royce's syntax skills by 6 months as demonstrated on post testing.

INSTRUCTIONAL SERVICES

	Subjects	Hrs/Wk	Beg.	End	Person Responsible
( ) Regular					
( ) Special Ed					
(X) Speech	Language Therapy	1/wk	9/18/81	5/82	[illegible]
( ) Vocational Education for Handicapped					
Vocational Career Field					
Cooperative Work Training					

Describe specialized building modifications, personnel and instructional/adaptive equipment needed to implement the child's program:

PLACEMENT DECISIONS:

Level of Instruction: ( ) Pre-elementary (X) Elementary ( ) Middle School ( ) Senior High

Campus Location: T.C. Terry Type of Special Class Speech/Lang. Therapy

Guardian
– Other

ARD/IEP COMMITTEE REPORT

Date

me La Royce Smith I.D. No. 507954 Student Services No. 53817

RELATED SERVICES:
Describe related services to be provided to implement goals:

	Beg.	End	Person Responsible
( ) Transportation (Specify any needed adaptations)			
( ) Other			

In brief narrative form, give justification for each service provided:

It is the opinion of the members of the committee that this child has not been placed in Special Education on the basis of: 1) only deficiencies identified as directly attributable to a different cultural life style, or to not having had education opportunities, or to not having achieved from previous educational experiences or 2) criteria which were developed solely on the command of the English language (for national origin, minority or linguistically different students only).

SIGNATURES OF THE COMMITTEE MEMBERS

I agree with decisions	I do not agree with all decisions (Comments must be attached)	Signature	
		Daniel A Ross	Chairman/Administrator
			Parent/Guardian
			Educational Liaison
			Diagnostician
			Home/School Coordinator
			Psychological Associate
			Health Professional
✓		Tammy Vines	Special Education Teacher
✓		Tawni Greenberg	Speech Clinician
			OT/PT
			Representative of Visually Handicapped or Deaf Education
			Student
			Vocational Teacher
			Counselor
			Other

If parent or guardian was not present, designate person to follow-up with parent contact: Speech Therapist

DEFENDANT'S EXHIBIT NUMBER 45

WHITE — Appraisal Team,Central File
CANARY — Local School
PINK — Appraisal Team
GOLDENROD — Parent

4.2

dallas independent school district

ADMISSION, REVIEW AND DISMISSAL REPORT

MAY 25 1982

SPECIAL EDUCATION

ANNUAL REVIEW/END-OF-YEAR SUMMARY REPORT

Date of Review 4-6-82

Student's Name Kakayla Smith Date of Birth 4-23-71

Student Services No. 53817 Student ID No. 507954

Address 7427 Brierfield Home Elementary School Terry

Parent's Name M/M Terry Smith Telephone No. 224-7690

Name of Current School Terry Grade Placement for Next Year 5

RECOMMENDATIONS

☑ Current instructional arrangement Resource: reading & Speech

☑ Continuation in program with no changes

☐ Change in instructional arrangement. Specify _____

☐ Change in eligibility category. Specify: From — _____ : To — _____

☐ Schedule Re-evaluation by 5-84

☐ Dismiss from Special Education. Specify reasons: _____

Comments on any of the above: Referral is being made for psychological consultation.

☐ Eligible for Transportation on Basis of _____

☑ Name of Parent, Guardian, or Surrogate in Attendance and Advised of Recommendations:

Mrs. Johnnie Smith Parent did attend

☑ Parent Not Present and Advised of Recommendations by Teacher Date _____

Admission, Review and Dismissal Committee:

Chairperson Pamela C Rose — Administrator

T. G. Terry — School

_____ — Nurse

Louise Scott — Diagnostician

_____ — Counselor

Laura Greenberg — Speech Clinician

B. Quinn — Psychologist

Tammy Vines — Special Education Teacher

Norwood King — Home-School Coordinator

Form SE-35—10M—9740—81

WHITE — Central File
CANARY — Local School
PINK — Teacher
GOLDENROD — Parent

Date
Mo. Day Yr.

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INDIVIDUALIZED EDUCATIONAL PROGRAM

Student _____ (Last) _____ (First) _____ (Middle) DOB 7 23 71 (Mo. Day Yr.)

School _____ ADAPTIVE EDUCATION NO. 53817

PRESENT LEVEL OF PERFORMANCE (as identified by formal and informal assessment)

GOALS (OBJECTIVES) LONG TERM — PRIORITIZED

PLACEMENT RECOMMENDATIONS AND JUSTIFICATION: (Least restrictive environment)

Portion of Time in Regular Classrooms: L.A., Math, Soc. Studies, Art, Music, P.E.

Individualized Educational Planners (signature)	Relationship to Student	Date	Individualized Educational Planners (signature)	Relationship to Student	Date

Form SE-34-20M-846-78

DEFENDANT'S EXHIBIT NUMBER 46

WHITE — District Office
CANARY — Local School
PINK — Parent

dallas independent school district

MAY 26 1983

Admission, Review and Dismissal
Individualized Educational Program
Committee Report

Date April 6, 1983

Name LaRoyce Smith I.D. No. 507954 Student Services No. 538174

Date of Birth 04-23-71 School J. D. Terry Grade 5th

Parent/Guardian Leroy Smith Phone Numbers: Bus. _____ Home _____

Home Address 7407 Brierfield K-3 School Terry

Notice of meeting sent to parents by Sandra Windsor Date 3-28-83 & 4-19-83

Purpose of ARD/IEP Meeting Annual Review Date 4-7-83

I. The Committee reviewed the following data:

A. Assessment Reports reviewed and attached:

NA

B. Assessment data or information from the parent or student:

NA

C. Assessment data or information from other school personnel:

NA

D. Current instructional arrangement: Resource Room (Reading) & Speech

II. The committee decided that the student

____ did not meet any specific eligibility criteria at this time.

__X__ met the specific eligibility criteria for L.D. / Speech
(Handicapping condition(s))

The discussion of eligibility included the following points (specify points and persons making them):

NA

dallas independent school district

amp

Admission, Review and Dismissal/
Individualized Educational Program
Committee Report

Date 4-28-83

Name Lakeyia Smith I.D. No. 507934 Student Services No. 53817

III. The committee decided that this student

✓ needs special education services because of the handicapping condition(s) cited above.

___ does not need special education services at this time.

The discussion of need for services included the following points (specify points and persons making them):

aA

IV. The committee ensures that this student is not assigned to special education on the basis of criteria which were developed solely on the command of the English language.

✓ Yes ___ No

V. The committee ensures that this student was not placed in special education if the only deficiencies identified are directly attributable to:

A. a different cultural lifestyle ✓ Yes ___ No

B. not having had educational opportunities ✓ Yes ___ No

C. not having achieved from previous educational experiences ✓ Yes ___ No

Discussion:

N A

VI. Present competencies are identified in the attached Stage III assessment report in each of the following areas: ✓ Academic/Developmental, ___ Behavioral, ___ Physical, ___ Vocational.

Discuss additional competencies identified below:

N A

4918-83-E

DEFENDANT'S EXHIBIT NUMBER 47

08-9250-0103-00
Form SE-89—20M—7046—83-S

WHITE — District Office
CANARY — Local School
PINK — Parent

dallas independent school district

Admission, Review and Dismissal
Individualized Educational Program
Committee Report

Date 5-9-84 / 4/25/84

Name LaRoyce Smith I.D. No. 507971 Student Services No. 53817

Date of Birth 4/23/71 School T. G Terry Grade 6th

Parent/Guardian Leroy Smith Phone Numbers: Bus. _____ Home 224-7690

Home Address 7427 Brierfield Dr. K-3 School Terry

Notice of meeting sent to parents by Mrs S. Windsor Date 3-26-84

Purpose of ARD/IEP Meeting Annual Review Date 5-9-84

I. The Committee reviewed the following data:

A. Assessment Reports reviewed and attached:
Woodcock-Johnson 5-31
5-31 WISC-R DC EE

B. Assessment data or information from the parent or student:
NA

C. Assessment data or information from other school personnel:
Brigance Reading 4/2

D. Current instructional arrangement: Reading - Resource Room

II. The committee decided that the student

___ did not meet any specific eligibility criteria at this time.

✓ met the specific eligibility criteria for LD
(Handicapping condition(s))

The discussion of eligibility included the following points (specify points and persons making them):

AT
034-00
90—3M—7047—83-S

amp

WHITE — District Office
CANARY — Local School
PINK — Parent

dallas independent school district

Admission, Review and Dismissal/
Individualized Educational Program
Committee Report

Date 4/25/84

Name LaRoyce Smith I.D. No. 507954 Student Services No. 53817

III. The committee decided that this student

✓ needs special education services because of the handicapping condition(s) cited above.

____ does not need special education services at this time.

The discussion of need for services included the following points (specify points and persons making them):

Continues to need special education

IV. The committee ensures that this student is not assigned to special education on the basis of criteria which were developed solely on the command of the English language.

✓ Yes ____ No

V. The committee ensures that this student was not placed in special education if the only deficiencies identified are directly attributable to:

A. a different cultural lifestyle ✓ Yes ____ No

B. not having had educational opportunities ✓ Yes ____ No

C. not having achieved from previous educational experiences ✓ Yes ____ No

Discussion:

VI. Present competencies are identified in the attached Stage III assessment report in each of the following areas: ✓ Academic/Developmental, ____ Behavioral, ____ Physical, ____ Vocational.

Discuss additional competencies identified below:

DEFENDANT'S EXHIBIT NUMBER 49

WHITE – Central File
CANARY – Local School
PINK – Parent

Dallas Independent School District

amp

SCHOOL ADMINISTRATION BUILDING 3700 ROSS AVE.

ADMISSION, REVIEW, AND DISMISSAL (ARD) COMMITTEE MEETING
ANNUAL REVIEW SUMMARY

Date: 5-28-86

Student: Smith, Laroyce L. I.D. #: 507954 S.S. #: 53817

Birth Date: 4-23-71 School: D. A. Hulcy Grade: 8

Parent/Guardian: Leroy Smith Phone Numbers: Bus. 788-7431 Home: 224-7690

Home Address: 7427 Brierfield Dr. Dallas 75232 K-3 School: Jerry

Notice of meeting sent to parents by Pamela Skinner (Name of sender) Date: 5/19/86

Current Unit Type: LR Eligibility: no longer qualifies

Re-Eval. Due date: NA

I. The Committee reviewed the following data: (Annual assessment of present competencies.)

A. Instrument(s) _____ Most recent test date _____

Curriculum Area	Grade Equivalent	Curriculum Area	Grade Equivalent Developmental Level
☐ Reading	____	☐ Self-Help Skills	ITBS
☐ Mathematics	____	☐ Gross Motor	Rdg 8.3
☐ Written Language	____	☐ Fine Motor	WL 5.8
☐ Oral Language	____	☐ Other ____	math 6.6

B. Additional Information: The student was recommended to be placed out of sp. ed at the end of the 1986 School year

C. Strengths & Weaknesses:

D. Physical: The student ☐ does not ☐ does (see attachment) exhibit physical difficulties that affect participation in the educational setting.

E. Behavioral: The student ☐ does not ☐ does (see attachment) exhibit behavioral problems that affect participation in the educational setting. Regular school disciplinary procedures may be followed with this student.
☐ Yes ☐ No (See attachment.)

F. Prevocational/Vocational (when appropriate):

II. Recommendations of ARD Committee:

☐ Continuation in program with no changes.

☐ Change instructional arrangement. Specify: From _____ To _____

☐ Eligible for special transportation on the basis of _____.
Specify pick-up and/or delivery address if different from above:

_____

☐ Change eligibility category. Specify: From _____ To _____ (see required documentation for discussion of eligibility)

☑ Dismiss from special education. Specify reasons: prior recommendation, does not qualify

III. The committee ensures that this student is not assigned to special education on the basis of criteria developed solely on command of the English language; on deficiencies identified as directly attributable to a different culture, lifestyle, lack of educational opportunities; and is in the least restrictive environment. Discussion (if applicable):

WHITE — Central File
CANARY — Local School
PINK — Parent

Dallas Independent School District

Page ____ of ____

ARD/IEP COMMITTEE REPORT: Individual Education Program
ANNUAL GOALS AND SHORT-TERM INSTRUCTIONAL OBJECTIVES
FOR INDIVIDUAL INSTRUCTIONAL PLAN

☐ Draft _____ Date

☐ Accepted by ARD _____ Date

Student: Laroyce L. Smith I.D. #: 507954 S.S. #: 533517

Birth Date: 4/23/71 School: DA Hulcy Grade: _____

IV. ☑ Instructional Services: ☐ Related Services: Specify: Resource / Self Contained if needed

Duration of Services: from 8/86 (MDY) to 6/87 (MDY) Responsible Implementator (title only): Special Education Teacher

Goal Area: Lang Arts
Instructional Level: 9.0

Annual Goal: Laroyce will improve his language arts skills to appropriate grade level

SHORT TERM OBJECTIVES
The student will be able to:

	Circle Review Code and Evaluation Criteria	Date of Review	EVALUATION CRITERIA (PERFORMANCE STANDARDS MEASURING INSTRUMENT)
(1) use comprehension skills to understand whatever is read	A B C D E / 1 2 3 4 5		A. Brigance Inventory
(2) spell new and familiar words	A B C D E / 1 2 3 4 5		B. Teacher Observation
(3) use basic language rules while reading and writing	A B C D E / 1 2 3 4 5		C. Teacher made tests
	A B C D E / 1 2 3 4 5		D. Informal Inventories
	A B C D E / 1 2 3 4 5		E. Other: _____
	A B C D E / 1 2 3 4 5		With ____ % accuracy

Goal Area: _____
Instructional Level: _____

Annual Goal:

SHORT TERM OBJECTIVES
The student will be able to:

	Circle Review Code and Evaluation Criteria	Date of Review	EVALUATION CRITERIA (PERFORMANCE STANDARDS MEASURING INSTRUMENT)
	A B C D E / 1 2 3 4 5		A. Brigance Inventory
	A B C D E / 1 2 3 4 5		B. Teacher Observation
	A B C D E / 1 2 3 4 5		C. Teacher made tests
	A B C D E / 1 2 3 4 5		D. Informal Inventories
	A B C D E / 1 2 3 4 5		E. Other: _____
	A B C D E / 1 2 3 4 5		With ____ % accuracy

Review Codes
1. Mastered
2. Continued — progress satisfactory
3. Continued — progress unsatisfactory
4. Continued with modifications as indicated and attached
5. Discontinued — inappropriate

Attach additional goals as needed.

Comments attached: yes _____ no _____

40

WHITE — Central File
CANARY — Local School
PINK — Parent

Dallas Independent School District

Page ___ of ___

SCHOOL ADMINISTRATION BUILDING 3700 ROSS AVE.

ADMISSION, REVIEW, AND DISMISSAL COMMITTEE MEETING
ANNUAL REVIEW SUMMARY

Student: Smith, Larryse L. I.D. #: 507 954 S.S. #: 53817

V. Schedule of Services (List content areas/courses.)

A.

Special Education	Amount of time per day/week
Related Services	
Speech	
OT/PT	
Transportation	
Other	

Regular Education: If applies	Amount of time per day/week
Language Arts/English CLAI	5
Mathematics Form I	5
Social Studies/History WHS	5
Science/Health Into Phys.	5
Physical Education	5
Fine Arts	
Non-Academics/Electives	
Other	
Reading Lab	5
Study Hall	5

B. Modification recommended for regular, remedial and supportive programs: ☐ Yes ☑ No
(See attached page if answer is yes.)

C. The committee considered whether the student could meet the goals and objectives in each of the following instructional arrangements and services:

- ✓ Regular education only
- ___ Regular education with modifications
- ___ Regular education with support from special education
- ___ vocational program
- ___ special education class program
- ___ Special transportation
- ___ therapy
- ___ Services for auditorially handicapped (AH)
- ___ Orientation and Mobility (VH)
- ___ Vision training/instruction
- ___ Adaptive equipment
- ___ Other (specify)

D. The committee recommends placement in [redacted] name of program at [redacted] name of local school

Circle appropriate instructional arrangement code: A E F G H I M N O P Q

E. For the visually handicapped, auditorially handicapped, or autistic students, the committee has completed and attached additional IEP requirements. ☐ Yes ☐ No

F. See additional deliberation attached. ☐ Yes ☐ No

VI. I have participated in all the decisions listed on this and preceding pages of this report:

SIGNATURE	POSITION	COMMITTEE DECISIONS: AGREE	DISAGREE (comments must be attached)
Robert C Collins	*Administration	✓	
	*Parent		
	*Instruction		
J.K. Pinkney	*Special Education	✓	
L. McMahon	*Assessment[1]	✓	
	Health Professional		
	Speech Clinician		
Larryse Smith	Student	✓	
Gloria Boyd	Others		

*Required for decision
Assessment[1] personnel are required when interpretations of assessment data are being considered.

VII. The parent/guardian was not present. Person designated to follow-up with parent contact is Pinkney.

Dallas Independent School District

amp Attachment B

REGULAR TEACHER REPORT

Annual Reviews 19__

I. Student Name: Lawrence L Smith Grade: 8

II. Academic Progress: (Check and fill in all appropriate areas)

Area	Grade Level	Grade Currently
✓ Reading	8	7o
___ Math		
___ Spelling		

Instrument used to measure academic progress listed above Testing

III. Are there any service changes which should be considered at this time? ___ Yes ✓ No

If yes, please describe:

IV. Recommendations regarding grading, promotion, and retention are as follows:

Promotion

Dallas Independent School District

DISD

RESPONSE TO THE NOTICE OF THE ARD COMMITTEE MEETING

(To be completed by the parent)

Please complete the PARENTAL RESPONSE FORM and return as soon as possible to:

Staff Member Pamela Skinner School D.A. Hulcy Middle School

Address 9339 S. Polk Dallas, Tx. 75232

If you wish to have more information or wish to ask any questions, please call:

Staff Member Pamela Skinner Telephone Number 224-3529

Cut on this line and return this part:

PARENTAL RESPONSE TO THE NOTICE OF THE ARD COMMITTEE MEETING

Please check [X] one box to show your response to our invitation to attend the meeting.

- ☐ I will be able to attend the meeting on May 28, 1986 (Date) at 1:55 p.m. (Time)
- ☐ I would like to attend the meeting but will not be able to come when the meeting is planned.
- ☐ I will call Pamela Skinner (Staff Member), at 224-3529 (Telephone Number) to make plans for a date and time when I will be able to attend.
- ☐ I will not attend the meeting. I understand that I will be contacted regarding the recommendations of the ARD Committee.
- ☐ I would like for my child to attend at least part of the meeting.

Please check the YES box if the following statement is correct. Check NO if it is not correct.

☐ YES ☐ NO I have been given a copy of the booklet, PARENT AND STUDENT RIGHTS TO A SPECIAL EDUCATION, 1983. A school staff member has explained each section of this booklet to me, including pages _____

_____ _____
Signature of Parent, Guardian, or Surrogate Parent — Date

_____ _____
Signature of Interpreter (if used) — Date

_____
Name of Student

WHITE – Cumulative Files
CANARY – Local Files
PINK – Parents

Dallas Independent School District

amp

SUBJECT: NOTICE OF THE ADMISSION, REVIEW AND DISMISSAL (ARD) COMMITTEE MEETING

To: Mr. Leroy Smith (Name of Parent) Regarding Laroyce Smith (Name of Student) Date 5/19/86

From Staff Members of D.A. Hulcy Middle School (Name of School) S.S. # 53817

We would like to invite you to attend a meeting to discuss the education programming for your child. This is an ARD/IEP Committee Meeting. ("ARD/IEP" stands for Admission, Review, Dismissal/Individual Education Plan). If the Committee determines a child is eligible for Special Education, an Individual Education Plan (IEP) is developed. The committee also meets at least annually to review the child's progress in Special Education and to update the IEP. You are a member of this committee that meets to review the evaluation, tests, and academic progress of your child. Your child may also be present at this meeting.

The following persons are asked to attend the meeting:

NAME	POSITION	REPRESENTING
		Parent of Student
		School Administrator
		Special Education
		Regular Education
		Special Education Assessment
		Vocational Education
		Other

The purpose of this meeting is to review and discuss Laroyce Smith (Name of Student)

☐ Education Progress ☐ Educational Evaluation Results ☐ Education Program ☐ Educational Placement

The above action(s) are being considered because:

____ The student is working above/below grade level in one or more basic skills.
____ The student's behavior is inconsistent with that expected for other students the same age/grade.
____ The student's rate of progress has ____ increased ____ decreased.
____ The assessment reports are ready for review.
____ More appropriate service is available at alternate location.
____ Other (Please specify and describe) _____

The following assessment data and other information will be reviewed and discussed:

____ Classroom Observation
____ Report Card
____ *Medical Report
____ Information from Parent
____ *Group Achievement Test Scores
____ *Individual Achievement Test Scores
____ Teacher Reports
____ School Permanent Records
____ School Health Records
____ *Individual Psychological Instruments
____ *Independent Evaluation

We have tried to schedule the meeting at a time that is convenient to you and the school. The meeting will be held:

5/28/86 (Date) 1:55 (Time) Counselors' (Room) D.A. Hulcy School (Building) 9339 S. Polk (Address)

*Explanation or name of tests, name of physician, and/or name and procedure of independent evaluators are as follows:

_____

_____

Dallas Independent School District

Attachment A

Individualized Educational Plan for Annual ARD Review

I. Lance L Smith — [illegible] — 53517 — C A Hulcy — [illegible]
Student's Name — I.D. # — S.S. # — School — Grade (now)

A. Student's current placement: ___TC, ___DLS, ___SC, ___Pre-Voc, ___WAC, ___EC, ___DC, ___ALC, ___VAC,
X RR (Subj. in RR) Language Art

B. Special Classes: ___Chapter I, ___Bilingual, ___Local Remedial Program, ___Compensatory Reading, ___Desegregation Program

II. Academic Progress (Individual or Group Test, i.e. Brigance, Classroom Learner Standards, ITBS, TABS)
Instrument(s) April, 1994 Most recent test date.
(Teacher should attach test results)

Goal Area	Grade/Developmental Level
✓ Reading	ITBS 8.3
___Math	
✓ Written Language	ITBS 5.8 (Spelling)
___Oral Language	
___Self-Help Skills	
___Gross Motor	
___Fine Motor	
___Other	

Were IEP objectives satisfactorily met this year? ___Yes ✓ No
If no, circle all that apply:
A. Attendance B. Unexcused absence C. Lack of cooperation D. Inappropriate level of objectives
E. Limited/lack of motivation F. Other

III. Behavioral progress
A. Has student had discipline problems this year? ___Yes ✓ No
B. Instrument used for assessment (please attach):
C. Most Successful behavior management techniques used?
D. Unsuccessful behavior management techniques?

IV. Related services for the coming year: ___OT, ___PT, ___Adaptive PE, ___Speech, ___Vision, ___Transportation, ___Auditory

V. Vocational training (secondary schools only)
A. ✓ Recommended ___Not recommended ___In progress
B. Level of Vocation Services recommended:
Assessment Level ✓ 1 ✓ 2 ___3
Training: ___Magnet ___Local ___Pre-Voc ___WAC

V. Are there any service changes which should be considered at this time?
✓ Yes ___No If yes, describe: Lance has failed most of his classes CKP
he should be considered for self contained placement

Person completing form — Position — date
List attachments sent to central file:

CK Putney
Resource Teacher
May 21 1994

TEXAS EDUCATIONAL ASSESSMENT OF MINIMUM SKILLS

CONFIDENTIAL STUDENT REPORT

STUDENT: SMITH LAROYCE L
DATE OF BIRTH: 04/23/71
DISTRICT STUDENT ID: 507954
DISTRICT: 057-905 DALLAS ISD
CAMPUS: 023 CARTER H S
CLASS GROUP: FISHER
REPORT DATE: MAY 1987
DATE OF TESTING: FEBRUARY 1987
GRADE: 09

SUBJECT AREAS TESTED	OBJECTIVES	MASTERY	ITEMS CORRECT
MATHEMATICS	1.EQUIVALENCIES	-	1
	2.FRACTIONS (+,-)	-	2
	3.DECIMALS (×,÷)	-	4
	4.WORD PROBLEMS (+,-,×,÷)	YES	1
	5.WORD PROBLEMS (RATIO, PROPORTION, PERCENT)	-	3
	6.PERSONAL FINANCE PROBLEMS	-	2
	7.WORD PROBLEMS (MEASUREMENT UNITS)	YES	3
	8.AREA OF RECTANGLES, TRIANGLES	YES	3
	9.PROBABILITY	-	2
	10.CHARTS, GRAPHS	-	0
	11.FORMULAS	-	1
	TOTAL OBJECTIVES MASTERED: 3	TOTAL ITEMS CORRECT: 19	SCALED SCORE: 637
READING	1.MAIN IDEA	-	1
	2.MEANING OF WORDS	YES	3
	3.SPECIFIC DETAILS	-	2
	4.SEQUENCING OF EVENTS	YES	4
	5.DRAWING CONCLUSIONS	-	2
	6.FACT, OPINION	-	2
	7.CAUSE-AND-EFFECT	-	1
	8.GENERALIZATIONS	-	2
	9.AUTHOR'S POINT OF VIEW	-	2
	10.REFERENCE SOURCES	YES	4
	11.GRAPHIC SOURCES	YES	4
	TOTAL OBJECTIVES MASTERED: 4	TOTAL ITEMS CORRECT: 27	SCALED SCORE: 671
WRITING	1.CAPITALIZATION	YES	3
	2.PUNCTUATION	-	2
	3.SPELLING	YES	4
	4.CORRECT ENGLISH USAGE	-	2
	5.SENTENCE STRUCTURE	-	2
	6.PROOFREADING	YES	3
	MULTIPLE-CHOICE OBJECTIVES MASTERED: 3	TOTAL ITEMS CORRECT: 16	
	PERSUASIVE WRITTEN COMPOSITION RATING: 1		SCALED SCORE: 575

DEMONSTRATED MASTERY OF MINIMUM GRADE NINE [redacted]

DEMONSTRATED MASTERY OF MINIMUM GRADE NINE READING [redacted]

DEMONSTRATED MASTERY OF MINIMUM GRADE NINE [redacted]

DEFENDANT'S EXHIBIT 5

5067-03373-19185

46

TEXAS EDUCATIO
C

STUDENT: SMITH LAROYCE L DISTRICT:

DATE OF BIRTH: 04/23/71 CAMPUS:

DISTRICT STUDENT ID: 507954 CLASS GR

SUBJECT ASSESSED	OBJECTIVES
	1.EQUIVALENCIES 2.FRACTIONS (+,-) 3.DECIMALS (x,÷) 4.WORD PROBLEMS (+,-,x,÷) 5.WORD PROBLEMS (RATIO, PROPORTION 6.PERSONAL FINANCE PROBLEMS 7.WORD PROBLEMS (MEASUREMENT UNITS 8.AREA OF RECTANGLES, TRIANGLES 9.PROBABILITY 10.CHARTS, GRAPHS 11.FORMULAS
	TOTAL OBJECT
	1.MAIN IDEA 2.MEANING OF WORDS 3.SPECIFIC DETAILS 4.SEQUENCING OF EVENTS 5.DRAWING CONCLUSIONS 6.FACT, OPINION 7.CAUSE-AND-EFFECT 8.GENERALIZATIONS 9.AUTHOR'S POINT OF VIEW 10.REFERENCE SOURCES 11.GRAPHIC SOURCES
	TOTAL OBJECT
	1.CAPITALIZATION 2.PUNCTUATIO 3.SPELLING 4.CORRECT ENGLISH USAGE 5.SENTENCE STRUCTURE 6.PROOFREADING
	MULTIPLE-CHOICE OBJECT

PERSUASIVE WRITTEN COMPOSITION RA

BEST AVAILABLE COPY

Referral to Consulting Services

1982 discipline

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

FORM 0

dallas independent school district

CONFIDENTIAL
(FOR PROFESSIONAL USE ONLY)
Page _____

Student Services
Professional Report

Student's Name Smith, Tiffany Joyce (Last, First, Middle) School T. J. Terry

Student Identification No. 507954 Student Services No. 5-817

Report by L Cain (Name of Person) Assoc. School Psychologist (Profession)

Date 4 6 82 (Month, Day, Year)

Referred for psychological evaluation:

Tiffany has been implicated in numerous thefts at school this year, primarily by the speech clinician's pupils. School contacts [illegible] parents

DEFENDANT'S EXHIBIT NUMBER 53

08-8150-0103-00
Form SE-89—20M—7046—83-S

Hulcy R.R.

WHITE — District Office
CANARY — Local School
PINK — Parent

dallas independent school district

JUN 22 1984

Admission, Review and Dismissal
Individualized Educational Program
Committee Report

Date 5-9-84 11/25/84

Name LaRoyce Smith I.D. No. 50795H Student Services No. 53817

Date of Birth 4/23/71 School T.G Terry Grade 6th

Parent/Guardian Leroy Smith Phone Numbers: Bus _____ Home 224-7690

Home Address 7427 Brierfield Dr. K-3 School Terry

Notice of meeting sent to parents by Mrs S. Windsor Date 3-20-84

Purpose of ARD/IEP Meeting Annual Review Date 5-9-84

I. The Committee reviewed the following data:

A. Assessment Reports reviewed and attached:
NA Woodcock-Johnson 5-81
5-81 WISC-R DD 88

B. Assessment data or information from the parent or student:
NA

C. Assessment data or information from other school personnel:
Brigance Reading 4.2

D. Current instructional arrangement: Reading - Resource Room

II. The committee decided that the student

___ did not meet any specific eligibility criteria at this time.

1 met the specific eligibility criteria for LD
Handicapping condition(s)

The discussion of eligibility included the following points (specify points and persons making them):

05-8850-0104-00
Form SE-90—20M—7047—83-S

WHITE — District Office
CANARY — Local School
PINK — Parent

dallas independent school district

Admission, Review and Dismissal/
Individualized Educational Program
Committee Report

Date 4/25/84

Name LaRoyce Smith I.D. No. 507954 Student Services No. 53817

III. The committee decided that this student

✓ needs special education services because of the handicapping condition(s) cited above.

___ does not need special education services at this time.

The discussion of need for services included the following points (specify points and persons making them):

A

Continues to need special education

IV. The committee ensures that this student is not assigned to special education on the basis of criteria which were developed solely on the command of the English language.

✓ Yes ___ No

V. The committee ensures that this student was not placed in special education if the only deficiencies identified are directly attributable to:

A. a different cultural lifestyle ✓ Yes ___ No

B. not having had educational opportunities ✓ Yes ___ No

C. not having achieved from previous educational experiences ✓ Yes ___ No

Discussion:

A

VI. Present competencies are identified in the attached Stage III assessment report in each of the following areas: ✓ Academic/Developmental, ___ Behavioral, ___ Physical, ___ Vocational.

Discuss additional competencies identified below:

N.

09-8650-0105-00
Form SE-91—40M—7048—83-S

WHITE — District Office
CANARY — Local School
PINK — Parent
GOLDENROD — Teacher

dallas independent school district

Admission, Review and Dismissal/Individualized Educational Program Committee Report

Name LaRoyce Smith I.D. No. 507954 Student Services No. 53817 Date 4/25/84

VII. IEP Development

A. ANNUAL GOALS AND SHORT TERM INSTRUCTIONAL OBJECTIVES

Goal # I: ~~Improve reading skills to 7.0 grade level~~ Implementor Resource Teacher
Position

Beginning on:	OBJECTIVES The student will be able to:	As evidenced by:	*Review (1) Date	*Review (1) Code	Review (2) Date	Review (2) Code	Review (3) Date	Review (3) Code
	Improve Phonetic analysis	Baseline						
	Improve structural analysis							
	Improve Comprehension							
	Improve Vocabulary							

Goal # ____: _____ Implementor Resource Teacher

Beginning on:	OBJECTIVES The student will be able to:	As evidenced by:	*Review (1) Date	*Review (1) Code	Review (2) Date	Review (2) Code	Review (3) Date	Review (3) Code
		Baseline						

Attach Additional Goals, as needed.

Comments attached: ____ Yes ____ No

*Review Codes
1. Mastered
2. Continued — progress satisfactory
3. Continued — progress unsatisfactory
4. Continued with modifications as indicated and attached
5. Discontinued - inappropriate

52

08-8850-0106-00
Form SE-92-20H-7049-83E

WHITE — District Office
CANARY — Local School
PINK — Parent
GOLDENROD — Teacher

dallas independent school district

Admission, Review and Dismissal/ Individualized Educational Program Committee Report

Date 5-9-84

Name LaRoyce Smith I.D. No. 507954 Student Services No. 53817

Educational Services		Hrs./wk.	Initiation Date	Anticipated Duration	Justification
Special Education (If placement is not available at home school, placement will need to be reviewed by Special Ed. Coordinator	Resource Reading	5 wk	8-27-84	5-85	clig
Related	Speech				
	Transportation "D" — "C"				
	Occupational Therapy				
	Physical Therapy				
	Counseling				
	Other				
Regular Education	Computer Literacy	5 [illegible]	8-27-84	1 SEM	
	Science	"		5-85	
	Soc. Stud	"			
	Math	"			
	A.E. Math	"			
	Elective	"	↓	↓	
Vocational Education					
Physical Education	REG	5 [illegible]	8-27-84	1 SEM	

Regular Program Adaptations	Recommendations Attached	Yes	✓ No
Adaptive Equipment or Building Modifications	Recommendations Attached	Yes	✓ No
Behavior Management Procedures	Recommendations Attached	Yes	✓ No

C Annual Review must be done by (DATE) 4-85
Re-evaluation must be done by (DATE) 5-84

08-8850-0107-00
Form SE-93-20M-7850-83E

WHITE — District Office
CANARY — Local School
PINK — Parent
GOLDENROD — Teacher

dallas independent school district

Admission, Review and Dismissal/
Individualized Educational Program
Committee Report

Date 4/25/84

Name LaRoyce Smith I.D. No. 507954 Student Services No. 53817

D. During the development of the individual plan, the committee discussed alternative services and recommendations of individual committee members. A summary of that discussion is:

Student did not qualify for math when evaluated in 5-81. Re-evaluation due in fall '84

E. The committee ensures that the services outlined above constitute the least restrictive educational environment. ✓ Yes _____ No

VIII. For the visually handicapped or auditorially handicapped students, the committee has completed and attached additional IEP Requirements for Visually Handicapped and/or Auditorially Handicapped Students. _____ Yes _____ No.

IX. The ARD committee ensures that the parent(s) and/or student has had his/her rights explained to him/her, and that all procedural safeguards have been observed. ✓ Yes _____ No

X. I have participated in all of the decisions listed on the preceding pages on this data _____:

I agree with decisions	I do not agree with all decision (Comments must be attached)	Signature	
✓		[signature]	Chairman/Administrator
		[signature]	Parent/Guardian
			Educational Liaison
✓		Louise Scott	Special Education Assessment Specialist
			Visiting Teacher
✓			Health Professional
✓		Cassie Waterhouse	Special Education Teacher
			Speech Clinician
			OT/PT
			Representative of Visually Handicapped or Deaf Education
			Student
			Vocational Teacher
			Counselor
			Other

If parent or guardian was not present, designate person to follow-up with parent contact:

C. Waterhouse, Resource

Name and Position

Behavior
1984

Stage III assessment for
Annual ARD Review

I. LaRoyce Smith 507954 53817 Terry 5th
Student's Name ID# SS# School Current Grade

A. Student's current placement: __TC, __DLS, __SC, __Pre-VOC, ✓WAC, __EC, __Dev Cen, __ALC, __VAC, ✓RR (Subjects in RR) _____

B. Special Classes: __Chapter I, __Bilingual, __Local Remedial Program, Compensatory Reading

II. Academic Progress (Individual or Group Test; i.e. Brigance, ITBS, TABS, TAPS, ABC)
Instrument Brigance Pre-test date 8/83 Post test date 4/84
(Check and fill in all appropriate areas assessed)

	Area	Grade Level
✓	Reading	4½
	Math	
	Written Language	
	Oral Language	
	Self-help Skills	
	Gross Motor	
	Fine Motor	
	Other _____	

Were IEP objectives satisfactorially met this year? ✓yes ___no
If no, circle all that apply:
Attendance
Unexcused absences
Lack of cooperativeness
Other _____
Inappropriate objectives
Limited/lack of motivation
Frequent school changes (more than 2 per year)

III. Behavioral progress
A. Has student had discipline problems this year? ___yes ✓no
If yes, describe:

B. Most successful behavior management techniques used?

C. Unsuccessful behavior management techniques used?

IV. Related services for the coming year:
__OT __PT __Adaptive PE __Speech __Vision __Transportation __Auditory

V. Vocational training (secondary schools only)
A. ___Needed ___Not needed ___In progress
B. Level of Vocational Education recommended:
Assessment Level ___1 ___2 ___3 (MCMC)
Training: ___Magnet School, ___Local school, ___MCMC, ___Pre-Voc, ___WAC

VI. Are there any service changes which should be considered at this time? ___yes ✓no
If yes, describe:

VII. Cassie Waterhouse
Name of person completing this form
Resource Teacher
Position of person completing this form
May 7 1984
Date form was completed

DEFENDANT'S EXHIBIT 53

WHITE — District Office
CANARY — Local School
PINK — Referring Person

dallas independent school district

LETTER OF NOTICE OF ADMISSION, REVIEW, AND DISMISSAL COMMITTEE MEETING

Date 4-17-84

To the Parent of LaToya Lith Student Services No. _____

Address 7427 Brierfield Date of Birth 4-23-71

Dallas Tx 75232 School T. G. Terry

An Admission, Review, and Dismissal Committee is being scheduled to review your child's educational program for the purpose(s) checked below:

_____ Consideration or review of Eligibility for Special Education Services and of Assessment Reports.
_____ Review of instructional service.
_____ Review of related services.
✓ Annual Review of Individual Student Program.
_____ Other _____

Your presence at this meeting is requested so that we may work together to meet the educational needs of your child. We urge you to attend this meeting if at all possible. As the student's parent or legal guardian you have the right to:

Review all your child's records.
Review all tests and evaluation procedures.
Refuse to permit evaluations or changes in your child's educational placement.
Be fully informed of the results of evaluations of your child.
Obtain an independent evaluation at public expense.
Request an impartial due process hearing (Appeal Procedure).
Give prior consent or deny the disclosure of your child's school records to anyone other than educational personnel.

The meeting will be held on Thursday, May 10, 1984 (Date) at 9:30 AM (Time)

at T. G. Terry (Location)

This letter is to confirm the appointment made by phone on _____

Sincerely, [signature]
374-6656

Notice No. 1 ✓ 2 ___ 3 ___

Please Check the appropriate statement below and return the lower half of this form immediately to: [illegible]

PARENTAL RESPONSE

_____ I will attend the meeting. The date and time are acceptable.
_____ I would like to attend the meeting but cannot do so at the time suggested. Please call me at _____ and reschedule.
_____ I will not be able to attend. I understand that I will be contacted regarding the recommendations of the ARD Committee.

_____ _____
Date Parent Signature

5075—83-E

DEFENDANT'S EXHIBIT NUMBER 54

08-8850-0103-11
Form SE-89—16M—0114—84-S

6-k attached

Page 1 of 5

WHITE – District Office
CANARY – Local School
PINK – Parent

dallas independent school district

RR

Admission, Review and Dismissal
Individualized Educational Program
Committee Report

Meeting 4-10-85
Date 3-22-85

Name Laroyce Smith I.D. No. 507454 Student Services No. 53817

Date of Birth 4-23-71 School Hulcy Grade 7th

Parent/Guardian Mr & Mrs L. Smith Phone Numbers: Bus. _____ Home 224-7690

Home Address 7427 Brierfield Dr. K-3 School Terry

Notice of meeting sent to parents by L Hughes (Name of sender) Date 3-22-85

Purpose of ARD/IEP Meeting Annual Review & Re-eval data Date 4-10-85

I. The Committee reviewed the following data: (Include related services assessment — specify reports and dates.)

A. Assessment Reports reviewed and attached: (Indicate if reports are from another district.)

3-14-85 WISC-R: Verbal 75, Performance 84, Full Scale 78
WJ PEB II: Reading 2.6, Math 5.6, Written Language 4.2

B. Assessment data or information from the parent or student: (Include Developmental-Social information.)

9-19-84 Sociological: on file

C. Assessment data or information from other school personnel, agencies or other professionals.

10-1-84 Medical update - well child
3-22-85 Competency testing - see attached report

D. Current instructional arrangement and/or related services: Resource room

II. The committee decided that the student

_____ did not meet any specific eligibility criteria at this time.

✓ met the specific eligibility criteria for Transitional Learning Disabled (Handicapping condition)

The discussion of eligibility included the following points (specify points and persons making them):

See attached report

08-8850-0103-21
Form SS-90—15M—0115—84-S

dallas independent school district

Admission, Review and Dismissal/ Individualized Educational Program Committee Report

Name Laroyce Smith I. D. # 507934 S.S. # 53817 Date 3-22-85

III. The Committee decided that this student

✓ needs special education services because of the handicapping condition(s) sited above.

_____ does not need special education services at this time.

The discussion of need for services included the following points (specify points and persons making them):

IV. The committee ensures that this student is not assigned to special education on the basis of criteria which were developed solely on the command of the English Language ✓ **yes** _____ **no.**

Discussion:

A. Adaptations of testing procedures —

B. Use of interpreter —

V. The committee ensures that this student was not placed in special education if the only deficiencies identified are directly attributable to:

A. a different cultural lifestyle based on sociological data ✓ yes _____ no.

B. not having had educational opportunities based on sociological and school data ✓ yes _____ no.

C. not having achieved from previous educational experiences based on school data ✓ yes _____ no.

Discussion:

VI. Present competencies are identified in the attached IEP assessment report in each of the following areas: _____

Academic/developmental: (Grade or age level not acceptable)

Strengths: silent reading comprehension

Weaknesses: decoding skills, oral reading skills

Physical as it affects participation in:

Instructional setting:

Physical education: none

Behavioral, as it affects:

Educational programming:

Discipline: treat as a regular student

Vocational: (When appropriate)

dallas independent school district

Admission, Review and Dismissal/Individualized Educational Program Committee Report

Name Laroyce Smith School Hulcy I.D.# 507954 S.S.# 53817 Date of Meeting 4-10-85

VII. IEP Development for Special Education Instructional Services ☑ Related Services ☐ (Specify) Annual Review

Duration of Services from 8-26-85 (D/M/Y) to 6-1-86 (D/M/Y)

GOAL AREA: Lang. Arts ANNUAL GOAL (LEARNER STANDARD):

SHORT TERM (HIERARCHICAL) OBJECTIVES: The student will be able to: (skills, condition, and *performance)	RESPONSIBLE IMPLEMENTER (title only)	EVALUATION CRITERIA (PERFORMANCE STANDARDS MEASURING INSTRUMENT)	DATE TO BEGIN	EVALUATION DATE	OUTCOME OF EVALUATION 1	2	3	4	5
The Student will complete work according to the Learner Standards on 7th grade Level.	Teacher/ Resource	Briganance	8-85	5-86					

GOAL AREA: ANNUAL GOAL (LEARNER STANDARD):

SHORT TERM (HIERARCHICAL) OBJECTIVES: The student will be able to: (skills, condition, and *performance)	RESPONSIBLE IMPLEMENTER (title only)								

Attach Additional Goals as needed.
Comments attached; ____ yes ____ no____
*May be criteria for attaining baseline hierarchical objectives

Review Codes
1. Mastered
2. Continued-progress satisfactory
3. Continued-progress unsatisfactory
4. Continued with modifications as indicated and attached
5. Discontinued-inappropriate

08-8850-0106-00
Form 9E-92-20H-7049-83I

WHITE — District Office
CANARY — Local School
PINK — Parent
GOLDENROD — Teacher

dallas independent school district

Admission, Review and Dismissal/ Individualized Educational Program Committee Report

Date 3-22-85

Name Laroyce Smith I.D. No. 507954 Student Services No. 53817

Educational Services	E	Hrs./wk.	Initiation Date	Anticipated Duration	Justification
Special Education (If placement is not available at home school, placement will need to be reviewed by Special Ed. Coordinator	RR-LA	5	8-26-85	1 yr.	transitional placement
Related	Speech				
	Transportation "D" — "C"				
	Occupational Therapy				
	Physical Therapy				
	Counseling				
	Other				
Regular Education	Math	5	8-26-8	1 yr.	
	Soc Studies				
	Science				
	English				
	OE		8-26-85	1 sem	
	Ind Arts				
	Hmkg				
Vocational Education					
Physical Education	✓	5	8-26-85	1 sem	✓

Regular Program Adaptations — Recommendations Attached _____ Yes _____ ✓ No

Adaptive Equipment or Building Modifications — Recommendations Attached _____ Yes _____ ✓ No

Behavior Management Procedures — Recommendations Attached _____ Yes _____ ✓ No

C Annual Review must be done by (DATE) 5/86
Re-evaluation must be done by (DATE) NA

09-8850-0187-00
Form SE-93—20M—7949—84-E

WHITE — District Office
CANARY — Local School
PINK — Parent
GOLDENROD — Teacher

dallas independent school district

Admission, Review and Dismissal/ Individualized Educational Program Committee Report

Name Laroyce Smith I.D. No. 501954 S.S. No. 537017 Date 3-22-85

D. The committee considered whether the student could meet the goals and objectives in each of the following instructional arrangements and services:

- ✓ Regular education only
- ___ Regular education with modifications
- ✓ Regular education with support from special education
- ___ _____ vocational program
- ___ _____ special education class or program
- ___ Special transportation
- ___ _____ therapy
- ___ Services for auditorially handicapped (AH)
- ___ Orientation and Mobility (VH)
- ___ Vision training/instruction
- ___ Adaptive equipment
- ___ Other (specify) _____

E. The committee recommends placement in Resource Room (name of program) at Hulcy (name of base school) ✓

F. The committee ensures that the services outlined above constitute the least restrictive educational environment. ✓ Yes ___ No

VIII. For the visually handicapped or auditorially handicapped students, the committee has completed and attached additional IEP Requirements for Visually Handicapped and/or Auditorially Handicapped Students. ___ Yes ___ No NA

IX. The ARD committee ensures that the parent(s) and/or student has been given a parent(s)/student rights handbook and has had his/her rights explained to him/her, and that all procedural safeguards have been observed. ✓ Yes ___ No

X. ___ See additional deliberation attached. ___ See attached Request for Transportation form.

XI. I have participated in all of the decisions listed on this and preceding pages of this data:

Voting Member	I agree with decisions	I do not agree with all decisions (See attachment)	Signature	
✓	✓		Robert C. Ballew	Chairman/Administrator
				Parent/Guardian
				Parent/Guardian
✓	✓		Evelyn Maddox	Assessment Professional
✓	✓		E Maddox II	Special Education Teacher
				Regular Education Teacher
				Health Professional
				Speech Clinician
✓	✓			Student
✓	✓		Juanita Boyd	Others

XII. The parent/guardian was not present and the committee designated G Williams/L Cummings to follow-up with parent contact.

XIII. ___ I give permission for my child, _____, to receive special education services described in this plan. I understand that these services are needed because there is a legally-defined handicapping condition which interferes with learning to the extent that he/she cannot be adequately served in regular education without special education. I also understand that my permission may be revoked at any time.

___ I understand that special education services are not recommended for my child, _____ at this time because either there is no legally-defined handicapping condition or the condition does not prevent him/her from functioning adequately in regular education.

_____ Signature of Parent/Guardian

_____ Date

Teacher Report of Student Competency and Recommendations Behavior 1985

1. Laroyce Smith 507954 53817 Hulen 7th
Student's Name ID# SS# School Grade (now)

A. Student's current placement: __TC, __DLS, __SC, __Pre-Voc, __WAC, __EC, __DC, __ALC, __VAC, ✓RR (Subj. in RR Reading & Math

B. Special Classes: __Chapter I, __Bilingual, __Local Remedial Program, __Compensatory Reading, __Desegration Program

II. Academic Progress (Individual or Group Test, i.e. Brigance, Classroom Learner Standards, ITBS, TABS)
Instrument(s) Gates McGinitie Most recent test date
(Teacher should attach test results)

Goal Area	Grade/Developmental Level
✓Reading	3.7
__Math	
✓Written Language	4.9
__Oral Language	
__Self-Help Skills	
__Gross Motor	
__Fine Motor	
__Other_____	

Were IEP objectives satisfactorily met this year?
✓Yes __No
If no, circle all that apply:
A. Attendance B. Unexcused absence C. Lack of cooperation
D. Inappropriate level of objectives E. Limited/lack of motivation
F. Other_____

III. Behavioral progress
A. Has student had discipline problems this year?
__Yes ✓No

B. Instrument used for assessment (please attach):

C. Most Successful behavior management techniques used?

D. Unsuccessful behavior management techniques?

IV. Related services for the coming year: __OT, __PT, __Adaptive PE, __Speech, __Vision, __Transportation, __Auditory

V. Vocational training (secondary schools only)
A. __Recommended ✓Not recommended __In progress
B. Level of Vocation Services recommended:
Assessment Level __1 __2 __3
Training: __Magnet __Local __MCMC __Pre-Voc __WAC

VI. Are there any service changes which should be considered at this time
__Yes ✓No If yes, describe:_____

DEFENDANT'S EXHIBIT 54

L Hughes Teacher 3-22-85
Person completing form Position Date

List attachments sent to Central file: Competency Testing Behavior Checklist

08-8850-0118-00
Form SE-73-30M-7051-83

WHITE — District Office
CANARY — Local School
PINK — Referring Person

dallas independent school district

LETTER OF NOTICE OF ADMISSION, REVIEW, AND DISMISSAL COMMITTEE MEETING

Date 3-22 85

To the Parent of Laroyce Smith Student Services No. 53817

Address 7427 Brierfield Drive Date of Birth 4-23-71

Dallas, Tx. 75232 School Hulcy

An Admission, Review, and Dismissal Committee is being scheduled to review your child's educational program for the purpose(s) checked below:

_____ Consideration or review of Eligibility for Special Education Services and of Assessment Reports.
_____ Review of instructional service.
_____ Review of related services.
__✓__ Annual Review of Individual Student Program.
_____ Other _____

Your presence at this meeting is requested so that we may work together to meet the educational needs of your child. We urge you to attend this meeting if at all possible. As the student's parent or legal guardian you have the right to:

Review all your child's records.
Review all tests and evaluation procedures.
Refuse to permit evaluations or changes in your child's educational placement.
Be fully informed of the results of evaluations of your child.
Obtain an independent evaluation at public expense.
Request an impartial due process hearing (Appeal Procedure).
Give prior consent or deny the disclosure of your child's school records to anyone other than educational personnel.

The meeting will be held on Wednesday April 10, 1985 (Date) at 2:00-2:40 (Time)

at Hulcy (Location)

This letter is to confirm the appointment made by phone on _____

Sincerely,

L Hughes

Notice No. 1 ✓ 2 3

Please Check the appropriate statement below and return the lower half of this form immediately to: _____

PARENTAL RESPONSE

_____ I will attend the meeting. The date and time are acceptable.
_____ I would like to attend the meeting but cannot do so at the time suggested. Please call me at _____ and reschedule.
_____ I will not be able to attend. I understand that I will be contacted regarding the recommendations of the ARD Committee.

_____ (Date) _____ (Parent Signature)

WHITE — Permanent File
CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

dallas independent school district

6.0

PARENT APPROVAL
SPECIAL EDUCATION SERVICES

Student's Name Smith (Last) La Royce (First) (Middle)

Birth Date 4- 23- 71 (Month Day Year) School D.A. Hulcy

Student Identification # 507954 Student Services # 53817

1. SPECIAL EDUCATION RECOMMENDATION:
It is requested that my child receive assistance from a trained specialist with his/her learning problems.

I understand that the following special education services will be provided:

X 1. Placement in a special education instructional program as specified in the Individualized Educational Program
Special Education as per I.E.P.
Instructional Arrangement

___ 2. Speech therapy — minimum of one hour per week.

___ 3. Occupational therapy/physical therapy as approved by physician and authorized by ARD.

___ 4. Other (Specify) _____

I further understand that I am not obligated to accept these special services which are being offered by the Dallas Independent School District and may remove my child from such services any time I desire to do so.

1. I do wish my child to be placed. X Johnnie Smith
Signature of Parent/Legal Guardian

2. I have been informed that Special Education Services are not recommended (at this time) and accept these recommendations.

_____
Signature of Parent/Legal Guardian

3. I do not wish my child to be placed. _____
Signature of Parent/Legal Guardian

DATE: 4- 23- 85 (Month Day Year) A.B. Williams
Signature of DISD staff member obtaining parent's permission

Comments: V.T. gave mother a copy of Special Education Handbook!!

3700 Ross Avenue, Dallas, Texas 75204, 214/824-1620

Form SE-59 — 9/84 — 1195 - 60-E

DEFENDANT'S EXHIBIT NUMBER 55

WHITE — Central File
CANARY — Local School
PINK — Parent

Dallas Independent School District

Page 1 of ___

SCHOOL ADMINISTRATION BUILDING 3700 ROSS AVE.

ADMISSION, REVIEW, AND DISMISSAL (ARD) COMMITTEE MEETING
ANNUAL REVIEW SUMMARY

Date: 5-28-86

Student: Smith, Laroyce L. I.D. #: 507954 S.S. #: 53817

Birth Date: 4-23-71 School: D. M. Hulcy Grade: 8

Parent/Guardian: Leroy Smith Phone Numbers: Bus. 288-7431 Home: 224-7690

Home Address: 7427 Brierfield Dr. Dallas 75232 K-3 School: Jersey

Notice of meeting sent to parents by Pamela Skinner (Name of sender) Date: 5/19/86

Current Unit Type: LR Eligibility: no longer qualifies

Re-Eval. Due date: NA

I. The Committee reviewed the following data: (Annual assessment of present competencies.)

A. Instrument(s) _____ Most recent test date _____

Curriculum Area	Grade Equivalent	Curriculum Area	Grade Equivalent/ Developmental Level
☐ Reading	____	☐ Self-Help Skills	ITBS
☐ Mathematics	____	☐ Gross Motor	Rdg 8.3
☐ Written Language	____	☐ Fine Motor	WL 5.8
☐ Oral Language	____	☐ Other ____	math 6.6

B. Additional Information: The student was to be placed out of special ed at the end of the 1986 school year recommended

C. Strengths & Weaknesses:

D. Physical: The student ☐ does not ☐ does (see attachment) exhibit physical difficulties that affect participation in the educational setting.

E. Behavioral: The student ☐ does not ☐ does (see attachment) exhibit behavioral problems that affect participation in the educational setting. Regular school disciplinary procedures may be followed with this student. ☐ Yes ☐ No (See attachment.)

F. Prevocational/Vocational (when appropriate):

II. Recommendations of ARD Committee:

☐ Continuation in program with no changes.

☐ Change instructional arrangement. Specify: From _____ To _____

☐ Eligible for special transportation on the basis of _____
Specify pick-up and/or delivery address **if different** from above:

_____

☐ Change eligibility category. Specify: From _____ To _____ (see required documentation for discussion of eligibility)

☑ Dismiss from special education. Specify reasons: prior recommendation, does not qualify

III. The committee ensures that this student is not assigned to special education on the basis of criteria developed solely on command of the English language; on deficiencies identified as directly attributable to a different culture, lifestyle, lack of educational opportunities; and is in the least restrictive environment. Discussion (if applicable):

WHITE — Central File
CANARY — Local School
PINK — Parent

DISD

Page ____ of ____

ARD/IEP COMMITTEE REPORT: Individual Education Program
ANNUAL GOALS AND SHORT-TERM INSTRUCTIONAL OBJECTIVES
FOR INDIVIDUAL INSTRUCTIONAL PLAN

☐ Draft _____ Date

☐ Accepted by ARD _____ Date

Student: Laroyce L. Smith I.D. #: 507954 S.S. #: 53817

Birth Date: 4/23/71 School: D.A. Hulcy Grade: _____

IV. ☑ Instructional Services: ☐ Related Services: Specify: Resource / Self Contained if needed

Duration of Services: from 8/86 MO/YR to 6/87 MO/YR Responsible Implementator (title only): Special Education Teacher

Goal Area: Lang. Arts
Instructional Level: 9.0

Annual Goal: Laroyce will improve his language arts skills to greet grade level

SHORT TERM OBJECTIVES
The student will be able to:

	Circle Review Code and Evaluation Criteria	Date of Review	EVALUATION CRITERIA (PERFORMANCE STANDARDS MEASURING INSTRUMENT)
1. use comprehension skills to understand whatever is read	A B C D E / 1 2 3 4 5		A. Brigance Inventory
2. spell new and familiar words	A B C D E / 1 2 3 4 5		B. Teacher Observation
3. use basic language rules while reading and writing	A B C D E / 1 2 3 4 5		C. Teacher made tests
	A B C D E / 1 2 3 4 5		D. Informal Inventories
	A B C D E / 1 2 3 4 5		E. Other: _____
	A B C D E / 1 2 3 4 5		With ____ % accuracy

Goal Area: _____
Instructional Level: _____

Annual Goal:

SHORT TERM OBJECTIVES
The student will be able to:

	Circle Review Code and Evaluation Criteria	Date of Review	EVALUATION CRITERIA (PERFORMANCE STANDARDS MEASURING INSTRUMENT)
	A B C D E / 1 2 3 4 5		A. Brigance Inventory
	A B C D E / 1 2 3 4 5		B. Teacher Observation
	A B C D E / 1 2 3 4 5		C. Teacher made tests
	A B C D E / 1 2 3 4 5		D. Informal Inventories
	A B C D E / 1 2 3 4 5		E. Other: _____
	A B C D E / 1 2 3 4 5		With ____ % accuracy

Review Codes
1. Mastered
2. Continued — progress satisfactory
3. Continued — progress unsatisfactory
4. Continued with modifications as indicated and attached
5. Discontinued — Inappropriate

Attach additional goals as needed.

Comments attached: yes _____ no _____

WHITE — Central File
CANARY — Local School
PINK — Parent

Dallas Independent School District

Page ___ of ___

SCHOOL ADMINISTRATION BUILDING 3700 ROSS AVE.

ADMISSION, REVIEW, AND DISMISSAL COMMITTEE MEETING
ANNUAL REVIEW SUMMARY

Student: Smith, Lavoya L. I.D. #: 507 954 S.S. #: 53817

V. Schedule of Services (List content areas/courses.)

A.

Special Education	Amount of time per day/week
Related Services	
Speech	
OT/PT	
Transportation	
Other	

Regular Education: if applies	Amount of time per day/week
Language Arts/English CLAI	5
Mathematics Form I	5
Social Studies/History WS	5
Science/Health Into Phys.	5
Physical Education	5
Fine Arts	
Non-Academics/Electives	
Other	
Reading Lab	5
Study Skills	5

B. Modification recommended for regular, remedial and supportive programs: ☐ Yes ☑ No
(See attached page if answer is yes.)

C. The committee considered whether the student could meet the goals and objectives in each of the following instructional arrangements and services:

- ✓ Regular education only
- ___ Regular education with modifications
- ___ Regular education with support from special education
- ___ [illegible] vocational program
- ___ [illegible] special education
  class program
- ___ Special transportation
- ___ therapy
- ___ Services for auditorially handicapped (AH)
- ___ Orientation and Mobility (VH)
- ___ Vision training/instruction
- ___ Adaptive equipment
- ___ Other (specify) ___

D. The committee recommends placement in [illegible] at [illegible]
name of program name of local school

Circle appropriate instructional arrangement code: A E F G H I M N O P Q

E. For the visually handicapped, auditorially handicapped, or autistic students, the committee has completed and attached additional IEP requirements. ☐ Yes ☐ No

F. See additional deliberation attached. ☐ Yes ☐ No

VI. I have participated in all the decisions listed on this and preceding pages of this report:

SIGNATURE	POSITION	COMMITTEE DECISIONS AGREE	DISAGREE (comments must be attached)
Robert C Collins	*Administration	✓	
	*Parent		
	*Instruction		
OK Lutrey L. McMahon	*Special Education	✓	
	*Assessment[1]	✓	
	Health Professional		
	Speech Clinician		
LaRoyce Smith Glorenda Boyd	Student	✓	
	Others		

*Required for decision
Assessment[1] personnel are required when interpretations of assessment data are being considered.

VII. The parent/guardian was not present. Person designated to follow-up with parent contact is Putney.

Dallas Independent School District

Attachment B

REGULAR TEACHER REPORT

Annual Reviews 19__

I. Student Name: Laroyce L. Smith Grade: 8

II. Academic Progress: (Check and fill in all appropriate areas)

Area	Grade Level	Grade Currently
✓ Reading	8	7o
__ Math		
__ Spelling		

Instrument used to measure academic progress listed above Testing

III. Are there any service changes which should be considered at this time? __ Yes ✓ No

If yes, please describe:

IV. Recommendations regarding grading, promotion, and retention are as follows:

Promotion

WHITE — Parent
CANARY — Central Files
PINK — Local Files

Dallas Independent School District

RESPONSE TO THE NOTICE OF THE ARD COMMITTEE MEETING

(To be completed by the parent)

Please complete the PARENTAL RESPONSE FORM and return as soon as possible to:

Staff Member Pamela Skinner School D.A. Hulcy Middle School

Address 9339 S. Polk Dallas, Tx. 75232

If you wish to have more information or wish to ask any questions, please call:

Staff Member Pamela Skinner Telephone Number 224-3529

Cut on this line and return this part:

PARENTAL RESPONSE TO THE NOTICE OF THE ARD COMMITTEE MEETING

Please check [X] one box to show your response to our invitation to attend the meeting.

- ☐ I will be able to attend the meeting on May 28, 1986 (Date) at 1:55 p.m. (Time)
- ☐ I would like to attend the meeting but will not be able to come when the meeting is planned.
- ☐ I will call Pamela Skinner (Staff Member), at 224-3529 (Telephone Number) to make plans for a date and time when I will be able to attend.
- ☐ I will not attend the meeting. I understand that I will be contacted regarding the recommendations of the ARD Committee.
- ☐ I would like for my child to attend at least part of the meeting.

Please check the YES box if the following statement is correct. Check NO if it is not correct.

☐ YES ☐ NO I have been given a copy of the booklet, PARENT AND STUDENT RIGHTS TO A SPECIAL EDUCATION, 1983. A school staff member has explained each section of this booklet to me, including pages _____

_____ _____
Signature of Parent, Guardian, or Surrogate Parent *Date*

_____ _____
Signature of Interpreter (if used) *Date*

_____
Name of Student

WHITE — Central Files
CANARY — Local Files
PINK — Parents

Dallas Independent School District

SUBJECT: NOTICE OF THE ADMISSION, REVIEW AND DISMISSAL (ARD) COMMITTEE MEETING

To: Mr. Leroy Smith (Name of Parent) Regarding Laroyce Smith (Name of Student) Date 5/19/86

From Staff Members of D.A. Hulcy Middle School (Name of School) S.S. # 53817

We would like to invite you to attend a meeting to discuss the education programming for your child. This is an ARD/IEP Committee Meeting. ("ARD/IEP" stands for Admission, Review, Dismissal/Individual Education Plan). If the Committee determines a child is eligible for Special Education, an Individual Education Plan (IEP) is developed. The committee also meets at least annually to review the child's progress in Special Education and to update the IEP. You are a member of this committee that meets to review the evaluation, tests, and academic progress of your child. Your child may also be present at this meeting.

The following persons are asked to attend the meeting:

NAME	POSITION	REPRESENTING
		Parent of Student
		School Administrator
		Special Education
		Regular Education
		Special Education Assessment
		Vocational Education
		Other

The purpose of this meeting is to review and discuss Laroyce Smith (Name of Student)

☐ Education Progress ☐ Educational Evaluation Results ☐ Education Program ☐ Educational Placement

The above action(s) are being considered because:

____ The student is working above/below grade level in one or more basic skills.
____ The student's behavior is inconsistent with that expected for other students the same age/grade.
____ The student's rate of progress has ____ increased ____ decreased.
____ The assessment reports are ready for review.
____ More appropriate service is available at alternate location.
____ Other (Please specify and describe) _____

The following assessment data and other information will be reviewed and discussed:

____ Classroom Observation
____ Report Card
____ *Medical Report
____ Information from Parent
____ *Group Achievement Test Scores
____ *Individual Achievement Test Scores
____ Teacher Reports
____ School Permanent Records
____ School Health Records
____ *Individual Psychological Instruments
____ *Independent Evaluation

We have tried to schedule the meeting at a time that is convenient to you and the school. The meeting will be held:

5/28/86 (Date) 1:55 (Time) Counselors' (Room) D.A. Hulcy School (Building) 9339 S. Polk (Address)

*Explanation or name of tests, name of physician, and/or name and procedure of independent evaluators are as follows:

_____

_____

Dallas Independent School District

1986 Discipline

Attachment A

Individualized Educational Plan for Annual ARD Review

I. Laroyce L. Smith (Student's Name) 507954 (I.D. #) 538-17 (S.S. #) D.A. Hulcy (School) 8 (Grade (now))

A. Student's current placement: __TC, __DLS, __SC, __Pre-Voc, __WAC, __EC, __DC, __ALC, __VAC,
X RR (Subj. in RR) Language Arts

B. Special Classes: __Chapter I, __Bilingual, __Local Remedial Program, __Compensatory Reading, __Desegregation Program

II. Academic Progress (Individual or Group Test i.e. Brigance, Classroom Learner Standards, ITBS, TABS)
Instrument(s) April, 1984 Most recent test date.
(Teacher should attach test results)

Goal Area	Grade/Developmental Level
✓ Reading	ITBS 8.3
__ Math	
✓ Written Language	ITBS 5.8 / Spellency
__ Oral Language	
__ Self-Help Skills	
__ Gross Motor	
__ Fine Motor	
__ Other	

Were IEP objectives satisfactorily met this year? __Yes ✓ No
If no, circle all that apply:
A. Attendance B. Unexcused absence C. Lack of cooperation D. Inappropriate level of objectives
E. Limited/lack of motivation F. Other

III. Behavioral progress
A. Has student had discipline problems this year? __Yes ✓ No
B. Instrument used for assessment (please attach):
C. Most Successful behavior management techniques used?
D. Unsuccessful behavior management techniques?

IV. Related services for the coming year: __OT, __PT, __Adaptive PE, __Speech, __Vision, __Transportation, __Auditory

V. Vocational training (secondary schools only)
A. ✓ Recommended __Not recommended __In progress
B. Level of Vocation Services recommended:
Assessment Level ✓ 1 ✓ 2 __3
Training: __Magnet __Local __Pre-Voc __WAC

DEFENDANT'S EXHIBIT 55

V. Are there any service changes which should be considered at this time?
✓ Yes __No If yes, describe: Laroyce has failed most of his classes CKP Disagree
he should be considered for self-contained placement

Person completing form — Position — date
List attachments sent to central file:

CK Putney
Resource Teacher

STATE'S EXHIBIT NUMBER 76

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

Name of Child Tatacya Smith Date of Examination 9-15-81

	Normal	Abnormal	Not Examined	Describe Fully Any Abnormal Findings
GENERAL *(Continued)*	✓			Acuity tested ↓ b
Genitalia and Abdomen	?			Obese abd
Bone-Joint Muscle	✓			Sl. pes planus
Skin	?			? atopy, scratches under eyes
NEUROLOGICAL				
Orientation	✓			known days of week, mo. of year BDate yes
Cooperation	✓			
Behavior		✓		↓ CA expectancy
Gait/Balance	✓			Good prob. sl unsteady 2° wt
Coordination:			✓	
Gross		✓		adyschadochokenesia
Fine	✓			Sl. slot misplacing minimal overflow
Sensory	✓			primary
Reflexes	✓			+2 clonus (-) Bab ↓ b
Cranial Nerves	✓			
Speech			✓	? immature ? baby talk

Please circle:

1) This patient (does) ~~does not~~ have evidence of seizure disorder, significant hyperactivity or progressive neurologic disease.

2) This examination (does) ~~does not~~ suggest the presence of static neurologic deficit or developmental delay.

Explanation: presence one soft sign

To be Completed by Physician

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

Name of Child La Tracy Smith Date of Examination 9-15-87

MEDICAL ~~DIAGNOSIS~~: IMPRESSION: (1) L. Problems by hx
(2) Allergies by hx ? wind dust, atopic skin
RECOMMENDATIONS: (3) Slightly obese, wt 98% for ht/age
(4) Req. PE (5) Poss org neuro & CA expectancy: behavior, presence one soft sign; High risk factors include, maternal diabetes c convulsion during labor, infant c extended in hospital) stay.

Educational Implications: ☐ Yes ☐ No

Explanation: Possible organic cause for learning problems — see # (5)

Will follow-up be needed?
☒ Yes ☐ No
When? PRN

School RN F/U mch line & CHO's ofc, see # (3)

Signed R M Adams M.D.
(Physician)

RMADAMS MD
(Name Printed)

3700 Ross Ave Dallas, TX
(Address)

75204 824-1620
(Zip Code) (Telephone)

Thank you for providing this information. It will be helpful in making the appropriate recommendation for school placement.

PATRICIA McDONALD, R.N.—C.
SCHOOL NURSE PRACTITIONER
DISD. — 3700 ROSS AVE.
824-1620 EXT. 487

Sincerely yours,

R M Adams M.D.

Richard M. Adams, M. D.
Director — School Health Services
Dallas Independent School District

Form 3.0

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

dallas independent school district

CONFIDENTIAL
(FOR PROFESSIONAL USE ONLY)
Page 1

Student Services
Professional Report

Student's Name Smith, LaRoyce School J H Terry
(Last, First, Middle)

Student Identification No. 507954 Student Services No. 53817

Report by L. Greenberg Speech/Language Pathologist
(Name of Person, Profession)

Date 11-25-81
(Month, Day, Year)

On Nov. 25, 1981 a local A. R. D. Speech meeting was held in order to ~~~~ write La Royces Annual Speech goals. La Royces parents were unable to attend the meeting. Mrs. Greenberg and Mrs Veres (Plan A Teacher) attended the meeting. It was recommended that La Royce be enrolled in ~~Speech~~ Language therapy in order to ~~~~ his receptive and expressive vocabulary and syntax skills.

done by Pat Middleton last 78 2's B.O in plan A folder 4.0 For
year & on file

ARD/IEP COMMITTEE REPORT

Date 9/18/81

Name La Royce Smith I.D. No. 507954 Student Services No. 53817

ANNUAL GOALS: Address all areas that apply to the student's educational needs: Academic or Pre-academic (Language Arts, Math, other); Physical Education; Behavioral (Personal, Classroom, Social); Speech; Vocational; other

Base line: 5/19/81 Peabody PVT-R demonstrated a 3 year 6 month deficit as compared to chronological age in the area of receptive vocabulary skills. The TOLD also demonstrated the same measurable deficit and also indicated a severe deficit in grammatic completion. A 2 year deficit was demonstrated in oral language.

Annual Goals: 1) To raise La Royce's receptive and expressive vocabulary by one year as determined by post testing of above mentioned test. 2) To improve La Royce's syntax skills by 6 months as demonstrated on post testing.

INSTRUCTIONAL SERVICES

	Subjects	Hrs/Wk	Beg.	End	Person Responsible
( ) Regular					
( ) Special Ed					
(1) Speech	Language Therapy	1/wk	9/18/81	5/82	Speech Clinician
( ) Vocational Education for Handicapped					
Vocational Career Field					
Cooperative Work Training					

Describe specialized building modifications, personnel and instructional/adaptive equipment needed to implement the child's program:

PLACEMENT DECISIONS:

Level of Instruction: ( ) Pre-elementary (1) Elementary ( ) Middle School ( ) Senior High

Campus Location: T. G. Terry Type of Special Class Speech/Lang. Therapy

ARD/IEP COMMITTEE REPORT

Date 11-25-81

Name La Royce Smith I.D. No. 507954 Student Services No. 53817

RELATED SERVICES:
Describe related services to be provided to implement goals:

	Beg.	End	Person Responsible
( ) Transportation (Specify any needed adaptations)			
( ) Other			

In brief narrative form, give justification for each service provided:

It is the opinion of the members of the committee that this child has not been placed in Special Education on the basis of: 1) only deficiencies identified as directly attributable to a different cultural life style, or to not having had education opportunities, or to not having achieved from previous educational experiences or 2) criteria which were developed solely on the command of the English language (for national origin, minority or linguistically different students only).

SIGNATURES OF THE COMMITTEE MEMBERS

I agree with decisions	I do not agree with all decisions (Comments must be attached)	Signature	
		Daniel A Ross	Chairman/Administrator
			Parent/Guardian
			Educational Liaison
			Diagnostician
			Home/School Coordinator
			Psychological Associate
			Health Professional
✓		Tammy Vines	Special Education Teacher
✓		Laura Greenberg	Speech Clinician
			OT/PT
			Representative of Visually Handicapped or Deaf Education
			Student
			Vocational Teacher
			Counselor
			Other

If parent or guardian was not present, designate person to follow-up with parent contact: Speech Therapist - Parents were not able to attend meeting. Parents

CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

ARD/IEP COMMITTEE REPORT

Individual Service Plan

Date 9/18/81

Name La Royce Smith I.D. No. 507954 Student Services No. 53817

Specific Educational or Support Service Speech/Lang. Therapy Service Provider Speech/Language Patholog

Goal(s) Receptive-Expressive Vocabulary & Syntax

Short-Term Objective(s) (Include Evaluative Criteria)	Start Date	End Date	Review Date/ Results
1. La Royce will learn at least 5 new words a week. He will be able to give the meaning of each word and use it in a meaningful sentence. This will be done with 90% accuracy.	9/18/81		
			12/81
2. La Royce will learn to use plural nouns with 90% accuracy after 12 consecutive sessions.			
		5/82	

Recommendations for Specific Materials, Procedures, or Techniques

2nd & 3rd grade vocabulary list.
Target on language Book and work book
Goal language Program.
Folks language Program

WHITE
CANARY
PINK
GOLDENROD

WHITE — Permanent File
CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

ARD/IEP COMMITTEE REPORT

4.0

Individual Service Plan

DEC 15 1981

Date 11-81

Name Lakeyce Smith I.D. No. 507954 Student Services No. 53817

Specific Educational or Support Service Resource room Service Provider J. Vines

Goal(s)

Lakeyce will: Short-Term Objective(s) (Include Evaluative Criteria)	Start Date	End Date	Review Date/ Results
Increase reading comprehension by recalling facts, details and the main idea with 90% accuracy. Review all vowel sounds in isolation and in context with 90% accuracy. Increase sight vocabulary by going over new words repeatedly. Review consonant blends and digraphs with 90% accuracy. Review verb tenses by choosing the correct one to go in the sentence with 90% accuracy. Increase ability to express feelings and understand them.	11-81	2-82	2-82

Recommendations for Specific Materials, Procedures, or Techniques

Palo Alto Reading Series Bk. 8
Blue Dilly Dilly
Self development kit
Worksheets
Roller Skates
charts

CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

ARD/IEP COMMITTEE REPORT

Individual Service Plan

Name LaRoyce Smith I.D. No. 507954 Date 12-81

Student Services No. 53817

Specific Educational or Support Service Language Therapy Service Provider Speech Lang Pathologist

Goal(s) To improve receptive & expressive vocabulary & syntax skills by 1 yr

Short-Term Objective(s) (Include Evaluative Criteria)	Start Date	End Date	Review Date/ Results
Continue with same objectives as plan dated 9/18/81.	12/81		3/82
		5/82	

Recommendations for Specific Materials, Procedures, or Techniques

2nd & 3rd grade vocab list.
Target V. Language Book & workbook.
Head Langu. Ex kit.

82

28 - 4-6
31 - 4-6
32 - J

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team
GOLDENROD — Parent

4.2

dallas independent school district

ADMISSION, REVIEW AND DISMISSAL REPORT

SPECIAL EDUCATION

ANNUAL REVIEW/END-OF-YEAR SUMMARY REPORT

MAY 25 1982

Date of Review 4-6-82

Student's Name LaRoyce Smith — Date of Birth 4-23-71

Student Services No. 53817 — Student ID No. 507954

Address 1427 Brierfield — Home Elementary School Terry

Parent's Name m/m Leroy Smith — Telephone No. 224-7690

Name of Current School Terry — Grade Placement for Next Year 5

RECOMMENDATIONS

☑ Current instructional arrangement resource: reading & Speech

☑ Continuation in program with no changes

☐ Change in instructional arrangement. Specify _____

☐ Change in eligibility category. Specify: From — _____ : To — _____

☐ Schedule Re-evaluation by 5-84

☐ Dismiss from Special Education. Specify reasons: _____

Comments on any of the above: Referral is being made for psychological consultation.

☐ Eligible for Transportation on Basis of _____

☑ Name of Parent, Guardian, or Surrogate in Attendance and Advised of Recommendations:

Mrs. Johnnie Smith Parent did attend.

☑ Parent Not Present and Advised of Recommendations by Teacher Date _____

Admission, Review and Dismissal Committee:

Chairperson Daniel C Rose — Administrator

T. G. Terry — School

_____ — Nurse

Louise Scott — Diagnostician

_____ — Counselor

Layne Greenberg — Speech Clinician

B. Quinn — Psychologist

Tammy Vines — Special Education Teacher

Norwood King — Home-School Coordinator

Form SE-35—10M—9740—81

WHITE — Central File
CANARY — Local School
PINK — Teacher
GOLDENROD — Parent

Part I 4.0 2
SD, Page X

Date
4 | 6 | 82
Mo. Day Yr.

dallas independent school district

INDIVIDUALIZED EDUCATIONAL PROGRAM

Student Small (Last) LaRoyce (First) (Middle) DOB 4 | 23 | 71 (Mo. Day Yr.)

School Terry ADAPTIVE EDUCATION NO. 53817

PRESENT LEVEL OF PERFORMANCE (as identified by formal and informal assessment)

GOALS (OBJECTIVES) LONG TERM — PRIORITIZED

Improve reading recall, word attack, and comprehension.

PLACEMENT RECOMMENDATIONS AND JUSTIFICATION: (Least restrictive environment)

Resource: Reading
Speech

Portion of Time in Regular Classrooms: L.A., Math, Soc. Studies, Art Music P.E.

Individualized Educational Planners (signature)	Relationship to Student	Date	Individualized Educational Planners (signature)	Relationship to Student	Date

Form SE-34-3DM-845-78

ARD/IEP COMMITTEE REPORT

Name LaToyce Smith I.D. No. 507954 Date 4-6-82 Student Services No. 53817

RELATED SERVICES:
Describe related services to be provided to implement goals:

		Beg.	End	Person Responsible
( )	Transportation (Specify any needed adaptations)			
(✓)	Other Speech Services	8/82	5/83	Speech Clinician

In brief narrative form, give justification for each service provided:
Auditory association deficit justifies speech services

It is the opinion of the members of the committee that this child has not been placed in Special Education on the basis of: 1) only deficiencies identified as directly attributable to a different cultural life style, or to not having had education opportunities, or to not having achieved from previous educational experiences or 2) criteria which were developed solely on the command of the English language (for national origin, minority or linguistically different students only).

SIGNATURES OF THE COMMITTEE MEMBERS

I agree with decisions	I do not agree with all decisions (Comments must be attached)	Signature	
✓		Daniel A. Rose	Chairman/Administrator
✓		Johnnie Smith	Parent/Guardian
			Educational Liaison
✓		Louise Scott	Diagnostician
✓		Norwood King	Home/School Coordinator
✓		B Quinn	Psychological Associate
			Health Professional
✓		J. Vines	Special Education Teacher
✓		L. Greenberg	Speech Clinician
			OT/PT
			Representative of Visually Handicapped or Deaf Education
			Student
			Vocational Teacher
			Counselor
			Other

If parent or guardian was not present, designate person to follow-up with parent contact: Teacher

WHITE — Permanent File
CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

ARD/IEP COMMITTEE REPORT

Individual Service Plan

4.0

Name LaRoyce Smith I.D. No. 507454 Date 9-82

Specific Educational or Support Service resource room Student Services No. 53817

Goal(s) Service Provider J. Viers

LaRoyce will: Short-Term Objective(s) (Include Evaluative Criteria)	Start Date	End Date	Review Date/ Results
Increase reading comprehension by recalling facts in written & oral work w/ 90% accuracy.	9-82	11-82	11-15-82
Increase sight vocabulary by sounding out unknown words w/ 90% accuracy.			
Review consonant blends and digraphs w/ 90% accuracy.			
Identify syllables in words with 90% accuracy.			
Review all vowel sounds in context and in isolation with 90% accuracy.			
Improve neatness in handwriting.			
Review verb tenses by choosing the correct word to fit in the sentence with 90% accuracy.			

Recommendations for Specific Materials, Procedures, or Techniques

Palo Alto Series Bk. 9 worksheets

Roller Skates

Charts

WHITE — Permanent File
CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

ARD/IEP COMMITTEE REPORT

Individual Service Plan

Name La Royce Smith I.D. No. 507954 Date 4-6-82

Student Services No. 53817

Specific Educational or Support Service Language Therapy Service Provider Speech/Language Clinician

Goal(s) #1

Short-Term Objective(s) (Include Evaluative Criteria)	Start Date	End Date	Review Date/ Results
(1) La Royce will demonstrate receptive and expressive knowledge of 5 new vocabulary words a week. He will be able to orally use each word in a sentence w/90% accuracy	5/82		
(2) Given a word, La Royce will be able to give it's synonym w/90% accuracy in 15 speech sessions from a list of 50 words.			11/82
(3) Given a word, La Royce will give it's opposite w/90% accuracy from a list of 50 words in 15 speech sessions.			
(4) Given 3 words at a time, La Royce will be able to orally tell how they are alike with 90% accuracy from a list of 50 wds in 15 speech sessions.			
(5) Given 4 words, La Royce will be able to pick a word that is different from the other 3 words w/90% accuracy in 15 speech session			
(6) Given 4 words, La Royce will orally say which word does not belong and why w/90% accuracy out of a list of 50 words in 20 speech sessions.		5/83	

Recommendations for Specific Materials, Procedures, or Techniques

Language Remediation & Expansion
Goal Kit 2
Core Vocabulary list

ARD/IEP COMMITTEE REPORT

Date 4-6-82.

Name La Royce Smith I.D. No. 507954 Student Services No. 53817

ANNUAL GOALS: Address all areas that apply to the student's educational needs: Academic or Pre-academic (Language Arts, Math, other); Physical Education; Behavioral (Personal, Classroom, Social); Speech; Vocational; other

Baseline: 3-16-82 On the W.O.R.D. La Royce obtained age scores on the following subtests: Associations, synonyms, semantic absurdities, antonyms, definitions and multiple definitions that indicate a 3-4 deficit in these areas.

① By May 1983, La Royce will improve his skills in the following areas: Auditory association, synonyms, semantic absurdities, antonyms, definitions & multiple definitions by raising his score on the W.O.R.D.
② By May 1983, La Royce will improve his oral vocabulary skills by raising his score on the T.O.L.D. by 1 year.

INSTRUCTIONAL SERVICES

	Subjects	Hrs/Wk	Beg.	End	Person Responsible
( ) Regular					
( ) Special Ed					
(✓) Speech	Language Therapy	3hr/wk	5/82	5/83	Speech Clinician
( ) Vocational Education for Handicapped					
Vocational Career Field					
Cooperative Work Training					

Describe specialized building modifications, personnel and instructional/adaptive equipment needed to implement the child's program:

PLACEMENT DECISIONS:

Level of Instruction: ( ) Pre-elementary (✓) Elementary ( ) Middle School ( ) Senior High

Campus Location: T.G. Terry Type of Special Class Language Therapy

Stage III Assessment for
Annual ARD Review

I. LaRoyce Smith | 507954 | 53817 | T.G. Terry | ~~5th~~ 6th | 10.12
Student's Name | ID# | SS# | School | Grade | Age

A. Student's current placement: ✓RR, __RDLS, __SC, __Pre-VOC, __WAC, __EC, __Dev.Cen., __ALC, __VAC, __TC

B. Student's current special ed schedule:

Language Arts (✓Reading, __Writing, __Spelling, __other_____)	1 hours
Math ___	____hours
Social Studies ___	____hours
Science ___	____hours
Other (__VAC, __VEH, __CVAE, __MCMC, __Transportation Magnet)	____hours

C. Student's regular schedule:

Language Arts (__Reading, __Writing, __Spelling __other_____)	____hours
Math ✓	1 hours
Social Studies ✓	1 hours
Science ✓	2 hours
Shop/Hmkg ___	____hours
Special Classes: (__Chapter I; __Bilingual; __Local remedial program; __Compensatory reading)	1 hours
Electives: (__PE; __Art; __Music; __Speech/Drama; __Band; __Other	____hours

D. Related Services: __Transportation; _____(hr/wk) Speech; _____(hr/wk) OT; _____(hr/wk) PT; _____(hr/wk) Adaptive PE; _____(hr/wk) Vision; _____(hr/wk) Auditory; _____(hr/wk) other

II. Academic progress

A. Did student meet all IEP objectives? ✓yes __no
If no, discuss reasons:
Met all objts, covered, did not began working with student until 1/1983

B. Was pre- or post-testing done this year? ✓yes __no
If yes, please list tests and results:
~~(pre-test) Brigance (Readiness) 8/1982 (reading comprehension~~ Word recognition (35) reading comprehension 4.0 (post-test) Word recognition (38) reading comp. (4.0)

C. Did student take any group tests (ITBS, ABC, TABS, etc.) during this year? ✓yes __no
If yes, please list results:
ITBS will be taken the week of April 11th

III. Behavioral progress

A. Has student had discipline problems this year? __yes ✓no
If yes, describe:

B. Most successful behavior management techniques used?

C. Unsuccessful behavior management techniques used?

IV. Physical progress

A. Does student have any physical handicaps? __yes ✓no
If yes, describe:

WHITE — Permanent File
CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

ARD/IEP COMMITTEE REPORT

Individual Service Plan

4.0
Page 4 of

Name LaRoyce Smith I.D. No. 507954 Date 3/1/82

Student Services No. 53817

Specific Educational or Support Service Language Therapy Service Provider Speech / Language Clinician L. Greenberg

Goal(s) Goal #2

Short-Term Objective(s) (Include Evaluative Criteria)	Start Date	End Date	Review Date/ Results
Objectives #2 accomplished on plan 9-8-81. Additional objectives are as follows: 3 LaRoyce will use the appropriate forms of comparatives in sentences with 90% accuracy in 20 speech sessions	3/1/82	5/82	5/82

Recommendations for Specific Materials, Procedures, or Techniques

Target or Language Book
Dittos
Language Remediation & Expansion

WHITE — Permanent File
CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

ARD/IEP COMMITTEE REPORT

Individual Service Plan

Name LaRoyce Smith I.D. No. 507954 Date 2-82

MAPS Student Services No. 53817

Specific Educational or Support Service resource room Service Provider J. Viris

Goal(s)

LaRoyce will: Short-Term Objective(s) (Include Evaluative Criteria)	Start Date	End Date	Review Date/ Results
Increase reading comprehension by recalling facts in written & oral work w/ 90% accuracy.	2-82	5-82	5-82
Increase sight vocabulary by sounding out unknown words w/ 90% accuracy.			
Review consonant blends and digraphs w/ 90% accuracy.			
Identify syllables in words with 90% accuracy.			
Review all vowel sounds in context and in isolation with 90% accuracy.			
Improve neatness in handwriting.			
Review verb tenses by choosing the correct word to fit in the sentence with 90% accuracy.			

Recommendations for Specific Materials, Procedures, or Techniques

Palo Alto Series BR. 9 worksheets

Roller Skates

Charts

ARD/IEP COMMITTEE REPORT

Individual Service Plan

NOV 5 1982

5.0
Page 4 of

Date 11-1-82

Name La Royce Smith I.D. No. 507954 Student Services No. 53 817

Specific Educational or Support Service Language Therapy Service Provider L Greenberg CCC Sp

Goal(s) #1

Short-Term Objective(s) (Include Evaluative Criteria)	Start Date	End Date	Review Date/ Results
Objectives 2+3 on plan dated 4-6-82 accomplished with 90% accuracy or better. Continue with objectives 1, 4-6 on same plan. Additional objectives are as follows: (7) Given a picture card of an animal, vegetable, fruit or object, La Royce will be able to orally give 3 attributes for picture card with 90% accuracy. (8) Given a word, La Royce will be able to orally tell 3 attributes for each object with 90% accuracy	11/82	5/83	2/83 92

Recommendations for Specific Materials, Procedures, or Techniques

Language Expansion and Remediation
Goal Kit 2
Peabody Picture Cards

ARD/IEP COMMITTEE REPORT

FEB 8 1983

Individual Service Plan

Date 2-4-83

Name La Royce Smith I.D. No. 507954 Student Services No. 53817

Specific Educational or Support Service Language Therapy Service Provider L. Braenberg C.C.C. Sp.

Goal(s) #1

Short-Term Objective(s) (Include Evaluative Criteria)	Start Date	End Date	Review Date/ Results
objectives 4&5 on plan dated 11-1-82 accomplished with 90% accuracy. Continue with objectives 6-8 on same plan.	2/83	5/83	5/83

Recommendations for Specific Materials, Procedures, or Techniques

Language Remediation & Expansion
Goal 1 Kit 2
Picture Cards

WHITE — Permanent File
CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

dallas independent school district

4.0

LETTER OF NOTICE OF SPECIAL EDUCATION ADMISSION, REVIEW AND DISMISSAL COMMITTEE MEETING INITIAL ENTRY

Date 4-28-83

To the Parent of LaRoyce Smith Student Services No. _____

Address 7427 Brierfield Date of Birth _____

School T. G. Terry

A study of the educational needs of your child has been completed by the Special Education assessment staff. A committee would like to meet with you to discuss the results of this study. At this meeting you will be able to help in developing educational plans for your child.

As you have previously been informed, no change in the educational program of your child will take place without your written consent. If you are not able to attend the meeting, you will be contacted concerning the recommendations of the Committee. However, your presence at this meeting is requested so that we may work together to meet the educational needs of your child. We urge you to attend if at all possible.

The meeting will be held on April 28 (Date) at 10:00 AM. (Time)

at T. G. Terry (Location)

Please check the appropriate statement below and return one copy of the lower half of this form to: Sandra Windsor

If you prefer, you may respond by calling Sandra Windsor at 374-6656

Sincerely,

_____

_____

PARENTAL RESPONSE

____ I will attend the meeting. The date and time are acceptable.

____ I would like to attend but cannot do so at the time suggested. Please call me at _____ and reschedule.

✓ I will not be able to attend. I understand that I will be contacted regarding the recommendations of the ARD Committee.

_____ Date

_____ Parent signature

Child's Name LaRoyce Smith

Notice No. 1___ 2___ 3 ✓

Student Services No. _____

WHITE — Permanent File
CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

dallas independent school district

4.0

LETTER OF NOTICE OF SPECIAL EDUCATION ADMISSION, REVIEW AND DISMISSAL COMMITTEE MEETING INITIAL ENTRY

Date 4-19-83

To the Parent of LaRoyce Smith Student Services No. _____

Address 7427 Brierfield Date of Birth 4-23-71

School T. G. Terry

A study of the educational needs of your child has been completed by the Special Education assessment staff. A committee would like to meet with you to discuss the results of this study. At this meeting you will be able to help in developing educational plans for your child.

As you have previously been informed, no change in the educational program of your child will take place without your written consent. If you are not able to attend the meeting, you will be contacted concerning the recommendations of the Committee. However, your presence at this meeting is requested so that we may work together to meet the educational needs of your child. We urge you to attend if at all possible.

The meeting will be held on April 28, 1983 (Date) at 10:30 A.M. (Time)

at T. G. Terry (Location)

Please check the appropriate statement below and return one copy of the lower half of this form to: Sandra Windsor

If you prefer, you may respond by calling Sandra Windsor at 374-6656

Sincerely,

Sandra L. Windsor

PARENTAL RESPONSE

____ I will attend the meeting. The date and time are acceptable.

____ I would like to attend but cannot do so at the time suggested. Please call me at _____ and reschedule.

____ I will not be able to attend. I understand that I will be contacted regarding the recommendations of the ARD Committee.

_____ (Date) _____ (Parent signature)

Notice No. 1 ___ - 2 ✓ 3 ___

Child's Name LaRoyce Smith

Student Services No. _____

Date: 3-30-82

From: Principal

To: Parents or Guardian of LaRoyce Smith

An End-of-the-Year review meeting has been scheduled for the purpose of planning next years educational program for your child. Your participation in this meeting is requested.

The meeting has ~~been scheduled for~~ 10:40 am on Tues. April 6.

Please indicate below whether or not you plan to attend the meeting. If you have any questions, please call the school office.

Thank you,

Daniel G Ross
Principal

___ I will be able to attend at the scheduled time.

___ I will not be able to attend.

Please sign and return to Mrs. Vines, Room 105

LaRoyce Smith
Parent's signature

WHITE — District Office
CANARY — Local School
PINK — Referring Person

dallas independent school district

LETTER OF NOTICE OF ADMISSION, REVIEW, AND DISMISSAL COMMITTEE MEETING

Date 12-9-83

To the Parent of La Royce Smith Student Services No. 53817

Address 1427 Brierfield Date of Birth 4-23-71

School T6. Terry

An Admission, Review, and Dismissal Committee is being scheduled to review your child's educational program for the purpose(s) checked below:

- ✓ ~~Consideration~~ or review of Eligibility for (Speech) Special Education Services and of Assessment Reports.
- ____ Review of instructional service.
- ____ Review of related services.
- ____ Annual Review of Individual Student Program.
- ✓ Other Dismissal from Speech

Your presence at this meeting is requested so that we may work together to meet the educational needs of your child. We urge you to attend this meeting if at all possible. As the student's parent or legal guardian you have the right to:

Review all your child's records.
Review all tests and evaluation procedures.
Refuse to permit evaluations or changes in your child's educational placement.
Be fully informed of the results of evaluations of your child.
Obtain an independent evaluation at public expense.
Request an impartial due process hearing (Appeal Procedure).
Give prior consent or deny the disclosure of your child's school records to anyone other than educational personnel.

The meeting will be held on ~~Monday Tuesday~~ Wed 5 (Date) 12-14-83 at 8AM (Time)

at T6. Terry — Speech Room (Location)

~~This letter is to confirm the appointment made by phone on~~ _____

(Please sign, check & return with LaRoyce to school.) Sincerely, Mrs Greenberg

Notice No. 1 ✓ 2 ___ 3 ___

Please Check the appropriate statement below and return the lower half of this form immediately

to: MRS Greenberg

PARENTAL RESPONSE

____ I will attend the meeting. The date and time are acceptable.
____ I would like to attend the meeting but cannot do so at the time suggested. Please call me at _____ and reschedule.
✗ I will not be able to attend. I understand that I will be contacted regarding the recommendations of the ARD Committee.

12/13/83 (Date) ✗ Johnnie Smith (Parent Signature)

078—83-E

Form 89-20M-7046-83-S

98 JAN 05 1984

1-4-84 ee

WHITE — District Office
CANARY — Local School
PINK — Parent

SPECIAL EDUCATION JAN 9

dallas independent school district

Admission, Review and Dismissal
Individualized Educational Program
Committee Report

Date 12-14-83

Name La Royce Smith I.D. No. 507954 Student Services No. 53817

Date of Birth 4-23-71 School T.G. Terry Grade 6

Parent/Guardian Mrs. Smith Phone Numbers: Bus. 323-6000 Home 224-7690

Home Address 7427 Brierfield K-3 School

Notice of meeting sent to parents by L. Greenberg Date 12-9-83

Purpose of ARD/IEP Meeting Dismissal from Speech Date 12-14-83

I. The Committee reviewed the following data:

A. Assessment Reports reviewed and attached:
The WORD, test of expressive vocabulary and Semantics was administered. La Royce appeared to be functioning at or above his mental on all the subtests of the WORD. 12-5-83

B. Assessment data or information from the parent or student:

C. Assessment data or information from other school personnel:

D. Current instructional arrangement: Resource Room / Speech

II. The committee decided that the student

✓ did not meet any specific eligibility criteria at this time.

____ met the specific eligibility criteria for _____
Handicapping condition(s)

The discussion of eligibility included the following points (specify points and persons making them):
La Royce appears to be functioning at his mental age in all areas of expressive language. Therefore, Speech services are no longer needed.

dallas independent school district

Admission, Review and Dismissal/ Individualized Educational Program Committee Report

Date 12-14-83

Name LaRoyce Smith I.D. No. 507954 Student Services No. 53 817

III. The committee decided that this student

✓ needs special education services because of the handicapping condition(s) cited above.

____ does not need special education services at this time.

The discussion of need for services included the following points (specify points and persons making them):

See pg 1A

IV. The committee ensures that this student is not assigned to special education on the basis of criteria which were developed solely on the command of the English language.

✓ Yes ____ No

V. The committee ensures that this student was not placed in special education if the only deficiencies identified are directly attributable to:

A. a different cultural lifestyle ✓ Yes ____ No

B. not having had educational opportunities ✓ Yes ____ No

C. not having achieved from previous educational experiences ✓ Yes ____ No

Discussion:

VI. Present competencies are identified in the attached Stage III assessment report in each of the following areas: ____ Academic/Developmental, ____ Behavioral, ____ Physical, ____ Vocational.

Discuss additional competencies identified below:

On the WORD LaRoyce obtained the following subtest scores: Associations 13 yrs. 6 mths.
Synonyms 11 yrs. 8 mths.
Semantic Absurdities 10 yrs. 11 mths.
Antonyms 14 yrs. 8 mths.
7 yrs. 8 mths.

BEST AVAILABLE COPY

dallas independent school district

Admission, Review and Dismissal/Individualized Educational Program Committee Report

Name La Royce Smith I.D. No 30.1954 Student Services No 53817 Date 5-7-93

VII. IEP Development

A. ANNUAL GOALS AND SHORT TERM INSTRUCTIONAL OBJECTIVES

Goal # 1 Improve Auditory Association Skills Implementor Speech/Language Clinician (Position)

Beginning on:	OBJECTIVES The student will be able to:	As evidenced by: WORD	*Review (1) Date	Code	Review (2) Date	Code	Review (3) Date	Code
5/93 ①	orally tell how 3 different described objects are alike with 70% accuracy		11/93	1				
5/93 ②	given 4 words, orally pick out the word that does not belong with 90% accuracy		11/93	1				
11/93 ③	given 4 words, orally pick out the word that does not belong & tell why with 90% accuracy		11/93	1				
11/93 ④	orally complete a spatial analogy with 90% accuracy		11/93	2				

Goal # ____ Implementor ____

Beginning on:	OBJECTIVES The student will be able to:	As evidenced by:	*Review (1) Date	Code	Review (2) Date	Code	Review (3) Date	Code

Attach Additional Goals as needed.

*Review Codes
1. Mastered
2. Continued — progress satisfactory
3. Continued — progress unsatisfactory
4. Continued with modifications as indicated and attached
5. Discontinued — Inappropriate

ments attached: ____ Yes ____ No

WHITE — District Office
CANARY — Local School
PINK — Parent
GOLDENROD — Teacher

dallas independent school district

Admission, Review and Dismissal/ Individualized Educational Program Committee Report

Date 12-14-83

Name LaRoyce Smith I.D. No. 507954 Student Services No. 53817

Educational Services		Hrs./wk.	Initiation Date	Anticipated Duration	Justification
Special Education (If placement is not available at home school, placement will need to be reviewed by Special Ed. Coordinator					
Related	Speech	No Speech Services			
	Transportation "D" — "C"				
	Occupational Therapy				
	Physical Therapy				
	Counseling				
	Other				
Regular Education					
Vocational Education					
Physical Education					

Regular Program Adaptations	Recommendations Attached	____ Yes	✓ No
Adaptive Equipment or Building Modifications	Recommendations Attached	____ Yes	✓ No
Behavior Management Procedures	Recommendations Attached	____ Yes	✓ No

C Annual Review must be done by (DATE)_____
Re-evaluation must be done by (DATE)_____

4572—10,500—82-E

dallas independent school district

Admission, Review and Dismissal/ Individualized Educational Program Committee Report

Date 12-14-83

Name LaRoyce South I.D. No. S-07954 Student Services No. S-3817

D. During the development of the individual plan, the committee discussed alternative services and recommendations of individual committee members. A summary of that discussion is:
It is recommended that LaRoyce be dismissed
ork Speech services because he is functioning at optimum
uel in all expressive language skills. C. Offenburg

E. The committee ensures that the services outlined above constitute the least restrictive educational environment. ✓ Yes _____ No

VIII. For the visually handicapped or auditorially handicapped students, the committee has completed and attached additional IEP Requirements for Visually Handicapped and/or Auditorially Handicapped Students. _____ Yes _____ No. N/A

IX. The ARD committee ensures that the parent(s) and/or student has had his/her rights explained to him/her, and that all procedural safeguards have been observed. ✓ Yes _____ No

X. I have participated in all of the decisions listed on the preceding pages on this data _____:

I agree with decisions	I do not agree with all decision (Comments must be attached)	Signature	
✓		[signature]	Chairman/Administrator
✓			Parent/Guardian
✓		mr. Willow	Educational Liaison
			Special Education Assessment Specialist
			Visiting Teacher
			Health Professional
✓		Cassie Waterbury	Special Education Teacher
✓		Laura Greenberg	Speech Clinician
			OT/PT
			Representative of Visually Handicapped or Deaf Education
			Student
			Vocational Teacher
			Counselor
			Other

If parent or guardian was not present, designate person to follow-up with parent contact:

L Greenberg
Name and Position

4913—83 E

WHITE — Permanent Record
CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Appraisal Staff

dallas independent school district

PARENTAL CONSENT TO INDIVIDUAL EVALUATION

Student Smith, LaRoyce I.D. No. 597954 Student Services No. 53817

Birth Date 4-23-71 School D.A. Hulcy Grade 7

Parent Mr & Mrs. Leroy Smith Address 7427 Brierfield Dr Phone No. 224-7690

To the parent: Your child has been referred for individual assessment. The evaluation procedures to be used will cover the following major areas:

Language/Communication: Speech and language skills, voice and fluency, are assessed through informal observation and formal evaluation of articulation, language dominance, expressive and receptive language. Examples of the types of tests which may be used are: Goldman-Fristoe tests of articulation and auditory discrimination, James Test of Language Dominance, Test of Language Development, Carrow Elicited Language Inventory.

Physical: Health histories, medical reports, tests and rating scales are used to evaluate the student's health and physical status, motor coordination, and visual/motor integration. Such assessment techniques may include: vision and hearing tests, medical examination, gross and fine motor inventories, and techniques such as Connor's Rating Scale for hyperkinesis and the Bender Gestalt and Beery tests of visual/motor integration.

Emotional/Behavioral: Informal and formal assessment of the student's social and emotional adjustment and interpersonal relationships include behavioral observations and rating scales, parent and teacher observations and reports of home and classroom behavior, and projective techniques. Evaluation techniques may include such instruments as the Forer Sentence Completions, the House, Tree, Person drawings, and Thematic Apperception Test.

Sociological: A parent interview is conducted and a parent questionnaire is completed to obtain information about the student's social and developmental history, the child's role in the family and community, adaptive behavior, and parental expectations.

Intellectual: Tests and rating scales are used to assess the student's development in verbal, numerical, and spatial abilities and to assess adaptive social behavior in the community. Examples of such assessment techniques include the Wechsler Intelligence Scales, the Stanford-Binet Intelligence Scale, SOMPA Adaptive Behavior Inventory, and the Vineland Social Maturity Scale.

Educational/Academic: Group achievement tests, samples of classroom work, classroom observations, and individual tests are studied to determine strengths and weaknesses in academic areas. Examples of individual tests which may be used include the Woodcock-Johnson Psycho-educational Battery, Peabody Individual Achievement Test, Wide Range Achievement Test, Key Math Diagnostic Arithmetic Test. For the young child, pre-academic skills are assessed by readiness tests and scales such as the Developmental Activities Screening Inventory.

I have been informed of the referral of my child for individual testing or other evaluation procedures described above. I have received a copy of "Parents' and Students' Rights for Special Education" and understand my rights.

✓ I give my consent to conduct the evaluation described.

____ I request a conference to discuss the referral of my child.

____ I request a conference to discuss my rights as outlined in the material received.

____ I do not want my child evaluated at this time.

Date: 9-19-84 Signature of Parent/Guardian LaRoyce Smith

Student Support Services Representative: AR Williams

absent 11-1-84

08-8850-0070-00
Form SS-2—60M—7237—83-E

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

6104

dallas independent school district

3.0

CONFIDENTIAL
(FOR PROFESSIONAL USE ONLY)
Page ____

Student Support Services

Student Smith, LA Royce I.D. No. 507954 Student Services No. 53817

School D.A. Hulcy Middle Grade 7th

Report by C. Dotson RN (Name of Person) School Nurse (Profession) Date 10/1/84

Vision 10/1/84 R 20/20 L 20/30 - Snellen Test

Hearing 10/1/84 Passed Pure tone Test

Telephone Conference c mother indicates a well-child somewhat over weight. He continues to take medications for his Allergies.

Thank you

C. Dotson RN

204-4069

WHITE — District Office
CANARY — Local School
PINK — Parent

dallas independent school district

Admission, Review and Dismissal
Individualized Educational Program
Committee Report

MAY 26 1983

Name LaRoyce Smith I.D. No. 507954 Date April 6, 1983

Date of Birth 04-23-71 School J.D. Terry Student Services No. 538174 Grade 5th

Parent/Guardian Leroy Smith Phone Numbers: Bus. _____ Home _____

Home Address 7451 Brierfield K-3 School Terry

Notice of meeting sent to parents by Sandra Windsor Date 3-22-83 & 4-19-83

Purpose of ARD/IEP Meeting Annual Review Date 4-7-83

I. The Committee reviewed the following data:

A. Assessment Reports reviewed and attached:

NA

B. Assessment data or information from the parent or student:

NA

C. Assessment data or information from other school personnel:

NA

D. Current instructional arrangement: Resource Room (Reading) & Speech

II. The committee decided that the student

____ did not meet any specific eligibility criteria at this time.

✓ met the specific eligibility criteria for LD / Speech
Handicapping condition(s)

The discussion of eligibility included the following points (specify points and persons making them):

NA

dallas independent school district

Admission, Review and Dismissal/ Individualized Educational Program Committee Report

Date 4-28-83

Name LaToyce Smith J.D. No. 507954 Student Services No. 53817

III. The committee decided that this student

✓ needs special education services because of the handicapping condition(s) cited above.

___ does not need special education services at this time.

The discussion of need for services included the following points (specify points and persons making them):

WA

IV. The committee ensures that this student is not assigned to special education on the basis of criteria which were developed solely on the command of the English language.

✓ Yes ___ No

V. The committee ensures that this student was not placed in special education if the only deficiencies identified are directly attributable to:

A. a different cultural lifestyle ✓ Yes ___ No

B. not having had educational opportunities ✓ Yes ___ No

C. not having achieved from previous educational experiences ✓ Yes ___ No

Discussion:

WA

VI. Present competencies are identified in the attached Stage III assessment report in each of the following areas: ✓ Academic/Developmental, ___ Behavioral, ___ Physical, ___ Vocational.

Discuss additional competencies identified below:

WA

WHITE — District Office
CANARY — Local School
PINK — Parent
GOLDENROD — Teacher

dallas independent school district

Admission, Review and Dismissal/Individualized Educational Program Committee Report

Name LaRoyce Smith I.D. No. _____ Student Services No. _____ Date 1/1983

VII. IEP Development

A. ANNUAL GOALS AND SHORT TERM INSTRUCTIONAL OBJECTIVES

Goal # I: To improve reading skills to 6.0 gd. level Implementor Resource Teacher
(Position)

Beginning on:	OBJECTIVES The student will be able to:	As evidenced by:	*Review (1) Date	*Review (1) Code	Review (2) Date	Review (2) Code	Review (3) Date	Review (3) Code
1/1983	Improve decoding skills	Baseline	2/83	2	5/83	-		
	Improve word attack			2				
	Improve rules of syllibication			3				
	through context and isolation							
	Improve reading fluency + comprehension			2				

Goal # II. _____ Implementor _____

Beginning on:	OBJECTIVES The student will be able to:	As evidenced by:	*Review (1) Date	*Review (1) Code	Review (2) Date	Review (2) Code	Review (3) Date	Review (3) Code

Attach Additional Goals, as needed.

*Review Codes
1. Mastered
3. Continued — progress unsatisfactory
4. Continued with modifications as indicated and attached

107

WHITE — District Office
CANARY — Local School
PINK — Parent
GOLDENROD — Teacher

dallas independent school district

Admission, Review and Dismissal/Individualized Educational Program Committee Report

Name La Royce Smith I.D. No. 509454 Student Services No. 53817 Date 4-7-83

VII. IEP Development

A. ANNUAL GOALS AND SHORT TERM INSTRUCTIONAL OBJECTIVES

Goal # 1: Improve Auditory Association Skills Implementor Speech/Language Clinician (Position)

Beginning on:	OBJECTIVES The student will be able to:	As evidenced by: WORD	*Review (1) Date	*Review (1) Code	Review (2) Date	Review (2) Code	Review (3) Date	Review (3) Code
4/83 ①	orally tell how 3 different, described objects are alike with 90% accuracy							
4/83 ②	given 4 words, orally pick out the word that does not belong with 90% accuracy							
10/83 ③	given 4 words, orally pick out the word that does not belong & tell why with 90% accuracy.							
10/83 ④	orally complete a spoken analogy with 90% accuracy							

Goal # ___: ___ Implementor ___

Beginning on:	OBJECTIVES The student will be able to:	As evidenced by:	*Review (1) Date	*Review (1) Code	Review (2) Date	Review (2) Code	Review (3) Date	Review (3) Code

...nal Goals, as needed.

Yes No

*Review Codes
1. Mastered
2. Continued — progress satisfactory
3. Continued — progress unsatisfactory
4. Continued with modifications as indicated and attached

108

WHITE — District Office
CANARY — Local School
PINK — Parent
GOLDENROD — Teacher

dallas independent school district

Admission, Review and Dismissal/ Individualized Educational Program Committee Report

Date 4-28-83

Name LaRoyce Smith I.D. No. 507954 Student Services No. 53817

Educational Services		Hrs./wk.	Initiation Date	Anticipated Duration	Justification
Special Education (If placement is not available at home school, placement will need to be reviewed by Special Ed. Coordinator	Reading	5	8-83	5-84	eligibility
Related	Speech	VOR	8-83	5-84	Clinic eligibility
	Transportation "D" — "C"				
	Occupational Therapy				
	Physical Therapy				
	Counseling				
	Other				
Regular Education	Lang Arts				
	Math				
	Soc Stud				
	Science				
	Art, Mu, PE				
Vocational Education					
Physical Education					

Regular Program Adaptations	Recommendations Attached	Yes	✓ No
Adaptive Equipment or Building Modifications	Recommendations Attached	Yes	✓ No
Behavior Management Procedures	Recommendations Attached	Yes	✓ No

C Annual Review must be done by (DATE) 4-84
Re-evaluation must be done by (DATE) 5-84

4912—83-E

WHITE — District Office
CANARY — Local School
PINK — Parent
GOLDENROD — Teacher

dallas independent school district

Admission, Review and Dismissal/ Individualized Educational Program Committee Report

Date 4-28-83

Name LaRoyce Smith I.D. No. 507454 Student Services No. 53817

D. During the development of the individual plan, the committee discussed alternative services and recommendations of individual committee members. A summary of that discussion is:

none

E. The committee ensures that the services outlined above constitute the least restrictive educational environment. ✓ Yes _____ No

VIII. For the visually handicapped or auditorially handicapped students, the committee has completed and attached additional IEP Requirements for Visually Handicapped and/or Auditorially Handicapped Students. _____ Yes _____ No.

IX. The ARD committee ensures that the parent(s) and/or student has had his/her rights explained to him/her, and that all procedural safeguards have been observed. ✓ Yes _____ No

X. I have participated in all of the decisions listed on the preceding pages on this data _____:

I agree with decisions	I do not agree with all decision (Comments must be attached)	Signature	
✓		Sandra Leslie	Chairman/Administrator
			Parent/Guardian
			Educational Liaison
✓		Louise Scott	Special Education Assessment Specialist
			Visiting Teacher
			Health Professional
✓		Cassie Waterhouse	Special Education Teacher
			Speech Clinician
			OT/PT
			Representative of Visually Handicapped or Deaf Education
			Student
			Vocational Teacher
			Counselor
			Other

If parent or guardian was not present, designate person to follow-up with parent contact:

local school personnel
Name and Position

4913–83-E

RECEIPT FOR RIGHTS BOOKLET

NAME OF STUDENT Smith, LaRyce

DATE OF BIRTH 4-23-71 SCHOOL Hulaq

This is to verify that I have received a copy of *Parent and Student Rights to a Special Education, 1983* which informs me of my rights throughout the child-centered educational process for handicapped students. These rights have been explained to me by

AR Williams (name), Visiting Teacher (position)

on 9-19-84 (date).

I understand that my rights include the right to receive:

(1) this and all other written notices in the language I understand (primary language) or, if needed, a translation of such orally, in sign language or in braille as appropriate, and

(2) answers from school personnel to additional questions I may have.

My signature below indicates that I received the booklet and understand its contents.

Johnnie Smith

SIGNATURE OF PARENT, GUARDIAN, OR ADULT STUDENT

DATE SIGNED 9-19-84

RECEIPT FOR RIGHTS BOOKLET

NAME OF STUDENT Smith, LaRyce

DATE OF BIRTH 4-23-71 SCHOOL Hulaq

This is to verify that I have received a copy of *Parent and Student Rights to a Special Education, 1983* which informs me of my rights throughout the child-centered educational process for handicapped students. These rights have been explained to me by

A R Williams (name), Visiting Teacher (position)

on 9-19-84 (date).

I understand that my rights include the right to receive:

(1) this and all other written notices in the language I understand (primary language) or, if needed, a translation of such orally, in sign language or in braille as appropriate, and

(2) answers from school personnel to additional questions I may have.

My signature below indicates that I received the booklet and understand its contents.

Johnnie Smith

SIGNATURE OF PARENT, GUARDIAN, OR ADULT STUDENT

DATE SIGNED 9-19-84

06-6650-0105-00
Form SE-91—40M—7048—83-S

WHITE — District Office
CANARY — Local School
PINK — Parent
GOLDENROD — Teacher

dallas independent school district

Admission, Review and Dismissal/Individualized Educational Program Committee Report

Name LaRoyce Smith I.D. No. 507954 Student Services No. 53817 Date 4/25/84

VII. IEP Development

A. ANNUAL GOALS AND SHORT TERM INSTRUCTIONAL OBJECTIVES

Goal # I: ~~Improve skills to 7.0 grade level~~ Implementor Resource Teacher
(Position)

Beginning on:	OBJECTIVES The student will be able to:	As evidenced by:	*Review (1) Date	Code	Review (2) Date	Code	Review (3) Date	Code
8/84	Improve phonetic analysis		11/84	2	2/85	2	5/85	2
	Improve structural analysis	Baseline						
	Improve Comprehension							
	Improve vocabulary							

Goal # ___: ___ Implementor Resource Teacher

Beginning on:	OBJECTIVES The student will be able to:	As evidenced by:	*Review (1) Date	Code	Review (2) Date	Code	Review (3) Date	Code
		Baseline						

Attach Additional Goals, as needed.

*Review Codes
1. Mastered
3. Continued — progress unsatisfactory
4. Continued with modifications as indicated and attached

CONFIDENTIAL

9-19-84
DATE

507954
I.D. NUMBER

53817
S.S. NUMBER

DEVELOPMENTAL SOCIOLOGICAL AND
ADAPTIVE BEHAVIOR INVENTORY
RE-EVALUATION

Last	First	MI	Birthdate	Sex	Ethnicity	Grade	School
Smith	LaRoyce		4-23-71	M	Black	7	Haley

Leroy Smith — Father's Name
Johnnie M. Smith — Mother's Name
Step-Father
Step-Mother

Mother & Father — Child lives with/relationship
7427 Briarfield — Address
75232 — Zip
224-7690 — Telephone

Language(s) spoken in the home English Language most spoken in the home English

Who has legal custody of the child? Mother & father

Describe the child's contact with an absent parent

Has the family constellation changed within the last three (3) years? ____ Yes ✓ No

Describe

What are your child's feelings about being in Special Education? Mother feels that Child like Resource / Special Education.

Your feelings about Special Education Mother feels that Special Education has been a great help to LaRoyce.

Have there been any changes in your child's behavior within the last three (3) years with you perceive as important? Mother explained that child is very responsible.

What responsibilites does your child have at home? Child wash dishes, clean his room.

Describe your child's status/progress in regard to academic achievement since entering Special Education Mother feels that child has progressed in both math & reading.

Describe the contacts you have had with school personnel during the last three year (conferences staffings, end of year reviews, etc.)

Informal assessment of Adaptive behavior functioning is believed ____
(to be/not to be)
within the limits of personal independence and social responsibility expected of the student's age and cultural group, both in school and away from school.

Johnnie Smith
Informant/Relationship

A R Williams
Visiting Teacher

Rev.5/83

DALLAS INDEPENDENT SCHOOL DISTRICT
STUDENT SUPPORT SERVICES
APPRAISAL REPORT

STUDENT NAME: LaRoyce Smith DATE OF BIRTH: 4-23-71

DATE OF REPORT: 3-14-85 CHRONOLOGICAL AGE: 13 I.D. NUMBER: 507954

SCHOOL: Hulcy GRADE: 7th STUDENT SERVICES NUMBER: 53817

REPORTING PROFESSIONAL: E. Cummings EDUCATION LIAISON: J. Boyd

REASON FOR REFERRAL

LaRoyce was referred for a routine three year re-evaluation. The student is currently enrolled in special education.

STAGE I OF ASSESSMENT

PHYSICAL, MENTAL, AND EMOTIONAL CONDITIONS

Language

Language dominance and proficiency assessment was performed on an informal basis and consisted of information obtained from local building staff as well as from interview of the student and information from parents. Assessment of language dominance and proficiency indicates that this student should be considered English dominant in both receptive and expressive language for the purpose of this evaluation.

Physical

A review of health history information collected during the referral process and observation during evaluation indicated no known significant health problems that may adversely affect school progress.

Emotional/Behavioral

Information provided by local building personnel and parents indicates no significant emotional/behavioral problems have been observed that may adversely affect learning. During the individual testing process, the student demonstrated normal levels of attention, cooperation, and patience.

Sociological

Sociological information was obtained from the student's parent. LaRoyce appears to meet the social expectations of his socio-cultural peer group. No identifiable sociological variables that may adversely affect learning at school were noted. More specific sociological information is attached.

Intellectual and Adaptive Behavior

Present measurable intellectual functioning was assessed using the Wechsler Intelligence Scale for Children-Revised (WISC-R). The WISC-R yielded the following results:

Verbal Scale IQ score of 75
Performance Scale IQ score of 84
Full Scale IQ score of 78

Performance Scale functioning was significantly higher than Verbal Scale. This measurement is believed to be a valid estimate of the range in which LaRoyce is capable of functioning. More specific assessment information is attached. Adaptive behavior functioning is believed to be within the limits of personal independence and social responsibility expected of LaRoyce's age and cultural group, both in school and away from school and appears to be commensurate with intellectual measures.

STAGE II OF ASSESSMENT

EDUCATIONAL PERFORMANCE LEVELS

Present educational performance levels were assessed through use of the Woodcock-Johnson Psycho-Educational Battery (W-J P-E B) part 2. Performance levels evaluation using the W-J P-E B part 2 yielded the following results:

	Grade Score	Instructional Range	Age Score	Standard Score
Reading	2.6	2.2-3.2	7-9	72
Math	5.6	4.7-6.6	11-0	83/82
Written Language	4.2	3.4-5.2	9-3	81/80

Regular classroom observation was also a part of the performance levels assessment. More specific Stage II Assessment information is attached. When measured potential was compared with achievement, LaRoyce demonstrated no significant deficits on educational performance levels testing.

STAGE III OF ASSESSMENT

BASIC LEARNING COMPETENCIES

The assessment of learning competencies was completed using informal testing. Skills deficits are noted on the attached report.

RECOMMENDATIONS TO ADMISSION, REVIEW AND DISMISSAL (ARD) COMMITTEE

The results of comprehensive assessment suggest that the student meets the eligibility criteria for transitional Learning Disabled (student no longer statistically qualifies; he has been working relatively well in regular classes during his seventh grade year) and a more restricted class setting may be warranted. Consideration for instructional curriculum should include the following: maintain in resource room through eighth grade year but prepare him to be mainstreamed when he enters high school.

Note: information included in this document reflects the most current administration of assessment instruments included in the Student Services folder. The name of the person administering the instrument and date of administration are recorded in the folder.

08-8650-0157-11
Form SE-86—5M—0101—84-E

WRITTEN REPORT OF ELIGIBILITY: LEARNING DISABLED ASSESSMENT DATA

dallas independent school district

STUDENT NAME (LAST, FIRST, M.I.)	CHRONOLOGICAL AGE	STUDENT ID NO. / DATE OF BIRTH / DATE OF ASSESSMENT
Smith, LaRoyce	13	507954 / 4-23-71 / 3-14-85
SCHOOL		

PROFESSIONAL EVALUATORS: Regular education teacher, person trained/certified in area of learning disabilities, assessment specialist.

STANDARD INTELLIGENCE AND ACHIEVEMENT TEST SCORES

☐ YES ☒ NO DOES THIS STUDENT'S SCORE ON THE WISC-R (STANDARDIZED INTELLIGENCE TEST) 3-14-85 (DATE ADMINISTERED) DEMONSTRATE THAT HE/SHE IS MENTALLY RETARDED?

☐ YES ☒ NO A COMPARISON OF THIS STUDENT'S STANDARD SCORES ON THE ABOVE REFERENCED INTELLIGENCE TEST AND THE WJ PEB (STANDARDIZED ACHIEVEMENT TEST) 3-14-85 (DATE ADMINISTERED) DEMONSTRATES A SEVERE DISCREPANCY (MORE THAN ONE STANDARD DEVIATION) BETWEEN ACADEMIC ACHIEVEMENT AND INTELLECTUAL ABILITY IN:

AREA(S) OF DISABILITY

IF A SEVERE DISCREPANCY DOES EXIST BASED ON THE COMPUTED STANDARDIZED SCORES COMPLETE THE FOLLOWING:

DEGREE OF DISCREPANCY

METHOD OF COMPUTING SEVERE DISCREPANCY

ADDITIONAL DOCUMENTATION: IF ELIGIBILITY CANNOT BE DETERMINED BY THE ABOVE PROCEDURE, A SEVERE DISCREPANCY BETWEEN ACADEMIC ACHIEVEMENT AND INTELLECTUAL ABILITY CAN BE DOCUMENTED BY USING ALL OF THE FOLLOWING (INCLUDE DATE AND INTERPRETATION OF EACH, SPECIFY ATTACHMENTS IF ANY).

DATA OBTAINED FROM STANDARDIZED ASSESSMENT INSTRUMENTS

REPORTS FROM PARENTS

OBSERVATION OF CLASSROOM PERFORMANCE

06-8850-0157-21
Form SE-87—SM—0102—84-E

WRITTEN REPORT OF ELIGIBILITY:
LEARNING DISABLED
ASSESSMENT DATA

dallas independent school district

STUDENT NAME (LAST, FIRST, M.I.)	STUDENT ID NO. / DATE OF ASSESSMENT
LaToyce Smith	507954 / 3-14-85

STUDENT WORK SAMPLES

OTHER ITEMS AS NEEDED

THE FOLLOWING RELEVANT CLASSROOM BEHAVIOR WAS OBSERVED BY:

OBSERVER NAME	POSITION	DATE OF OBSERVATION
E Cummings	Assessment Specialist	3-14-85

OBSERVATIONS

Self distracts by asking irrelevant questions. Shows some inconsistent reading (decoding) and math (regrouping) skills.

RELATIONSHIP OF THIS CLASSROOM BEHAVIOR TO THE STUDENT'S EDUCATION FUNCTIONING

Has passed all regular classes.

EDUCATIONALLY RELEVANT MEDICAL FINDINGS (IF ANY)

none

BASED ON THE DATA DOCUMENTED IN THIS REPORT, IT IS DETERMINED THAT THE SEVERE DISCREPANCY IS NOT CORRECTABLE WITHOUT SPECIAL EDUCATION FOR THE FOLLOWING REASON(S):

NA

08-8R50-0157-30
Form SE-87A — 3M — 0103 — 84 E

WRITTEN REPORT OF ELIGIBILITY:
LEARNING DISABLED
ASSESSMENT DATA -

dallas independent school district

STUDENT NAME (LAST, FIRST, M.I.)	STUDENT I.D. NO.
LaRoyce Smith	507951
	DATE OF ASSESSMENT: 3-14-85

THE FOLLOWING HAVE BEEN RULED OUT AS THE PRIMARY CAUSE OF THE SEVERE DISCREPANCY:

YES	NO	AREA	SOURCE OF DATA
		EMOTIONAL DISTURBANCE	DSI, teacher report
		VISUAL	Health Information
		HEARING	
		ORTHOPEDIC	
		CULTURAL DIFFERENCES	DSI
		ENVIRONMENTAL CAUSES	
		ECONOMIC DISADVANTAGES	

BASED ON THE DATA PRESENTED IN THIS REPORT LaRoyce (STUDENT NAME) DOES NOT APPEAR TO MEET THE ELIGIBILITY CRITERIA FOR A LEARNING DISABILITY ~~IN THE FOLLOWING AREA(S) OF DISABILITY:~~

Transitional placement is recommended for up to one year.

SIGNATURES OF PROFESSIONAL EVALUATORS	CONCUR	DISSENT	DATE
REGULAR EDUCATION TEACHER Juanita Boyd			
PERSON TRAINED/CERTIFIED IN LEARNING DISABILITY BMaddox	✓		4-10-85
ASSESSMENT SPECIALIST E. Cummings	✓		4-10-85

WISC-R RECORD FORM

Wechsler Intelligence Scale for Children—Revised

ADDRESS 121

PARENT'S NAME

SCHOOL Hulley GRADE 7

PLACE OF TESTING TESTED BY Lippman

REFERRED BY

WISC-R PROFILE

Clinicians who wish to draw a profile should first transfer the child's scaled scores to the row of boxes below. Then mark an X on the dot corresponding to the scaled score for each test, and draw a line connecting the X's.*

Scaled Score	VERBAL TESTS						PERFORMANCE TESTS						Scaled Score
	Information	Similarities	Arithmetic	Vocabulary	Comprehension	Digit Span	Picture Completion	Picture Arrangement	Block Design	Object Assembly	Coding	Mazes	
19	•	•	•	•	•	•	•	•	•	•	•	•	19
18	•	•	•	•	•	•	•	•	•	•	•	•	18
17	•	•	•	•	•	•	•	•	•	•	•	•	17
16	•	•	•	•	•	•	•	•	•	•	•	•	16
15	•	•	•	•	•	•	•	•	•	•	•	•	15
14	•	•	•	•	•	•	•	•	•	•	•	•	14
13	•	•	•	•	•	•	•	•	•	•	•	•	13
12	•	•	•	•	•	•	•	•	•	•	•	•	12
11	•	•	•	•	•	•	•	•	•	•	•	•	11
10	•	•	•	•	•	•	•	•	•	•	•	•	10
9	•	•	•	•	•	•	•	•	•	•	•	•	9
8	•	•	•	•	•	•	•	•	•	•	•	•	8
7	•	•	•	•	•	•	•	•	•	•	•	•	7
6	•	•	•	•	•	•	•	•	•	•	•	•	6
5	•	•	•	•	•	•	•	•	•	•	•	•	5
4	•	•	•	•	•	•	•	•	•	•	•	•	4
3	•	•	•	•	•	•	•	•	•	•	•	•	3
2	•	•	•	•	•	•	•	•	•	•	•	•	2
1	•	•	•	•	•	•	•	•	•	•	•	•	1

*See Chapter 4 in the manual for a discussion of the significance of differences between scores on the tests.

	Year	Month	Day
Date Tested	85	3	14
Date of Birth	71	4	23
Age	13	11	21

	Raw Score	Scaled Score
VERBAL TESTS		
Information	12	5
Similarities	12	7
Arithmetic	12	8
Vocabulary	20	3
Comprehension	17	7
(Digit Span)	( )	( )
Verbal Score		30
PERFORMANCE TESTS		
Picture Completion	19	8
Picture Arrangement	17	5
Block Design	24	7
Object Assembly	22	8
Coding	54	10
(Mazes)	( )	( )
Performance Score		38

	Scaled Score	IQ
Verbal Score	30	75
Performance Score	38	84
Full Scale Score	68	78

*Prorated from 4 tests, if necessary.

NOTES

distracted by self - by question which is not immediately understood

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The Psychological Corporation, New York, N.Y. 10017
74-103AS 9-990334

If appl., what is the reason for questioning the results? _____

Subtest / CLUSTER	Raw Score	Part Score from Table A	CLUSTER SCORE	Grade Scale	INSTRUCTIONAL RANGE Easy	INSTRUCTIONAL RANGE Difficult	Age Scale	AVERAGE CLUSTER SCORE ☐ Grade ☐ Age	a CLUSTER DIFFERENCE SCORE	Percentile Rank at ☐ Grade ☐ Age	Percentile Rank Range	RPI at ☐ Grade ☐ Age	Functioning Level
13. L-W Ident	(54)	156											
14. Word Attack	(26)	152											
15. Pass Comp	(25)	162	473	2.6	2.2	3.2	2-9	518	-45	3	2 to 5	/90	72
16. Calculation	(42)	258						523	-50	3	2		
17. Appl Probs	(49)	257	509	5.6	4.7	6.6	11-0	527	-18	13	9 to 18	/90	83
18. Dictation	(40)	252						534	-25	11	8	1.5	92
19. Prooling	(29)	246	498	4.2	3.4	5.2	9-3	525	-27	10	8 to 12	/90	81
20. Science	(39)							529	-31	9	8	12	82
21. Soc Studies	(37)												
22. Humanities	(36)												

13. L-W Ident	18	(54)											
17. Appl Probs	37	(49)											
18. Dictation	15	(40)											

23. Reading Interest		(25)											
24. Math Interest		(25)											
25. Wr Lang Interest		(25)											
26. Physical Interest		(35)											
27. Social Interest		(35)											

RESULTS FROM RELATED TESTS:

Test	Date of Testing	Results

RECOMMENDATIONS FOR FURTHER TESTING AND/OR PROGRAM PLANNING:

WHITE — Central File
CANARY — Local Building
PINK — Area Office

dallas independent school district

AREA ARD REVIEW OF LOCAL STAFFING

Student's Name Smith, (Last) LaRoyce (First) (Middle) Date of Review 1-30-79

Adaptive Education No. 53817 Student Identification No. 507954

Referring School T. G. Terry Birth Date 4-23-71

Review of (Date) Local ARD Staffing 1-31-79 (Date) Copy to: Jerry

COMPLETED FORMS RECEIVED:

1.0 ___ Pupil Personnel Committee Screening Report

1.1 ✓ Teacher's Observation Checklist

1.2 ✓ School and Health Information

Current Vision 4/78 (Date) and Hearing 2/78 (Date)

2.0 ✓ Referral for Individual Study

3.0 ___ Professional Reports Psychological 6/22/78 (Date) Educational ___ (Date)

4.0 ✓ Admission, Review, and Dismissal Report

4.1 ___ Eligibility for Transportation

H-56 ___ Physical Exam (School Health Services) ___ (Date)

6.0 ___ Parent Approval ___ (Date)

___ Sociological (Parent Questionnaire) ___ (Date)

AREA ARD DECISION

Local ARD Staffing has been reviewed and found:

___ Unacceptable for following reasons:

✓ Forms not received

H56

___ Eligibility not established

___ Other

___ Acceptable for ___ (Handicap) ___ (Code)

Regular classroom (Instructional Arrangement) ___ (Grade Level)

pending H56

Approved for: ___ Hours in Resource Room

___ (Date) Case completed for placement at Jerry (School)

AREA ARD COMMITTEE:

Jan Edwards
Chairperson

Bert Lakowitz
Psychologist

Chris Mundt LVN
Nurse (Health Services)

[signature]
Home-School Coordinator

Other

Form 92-38 — 5084 — 5223 — 78

WHITE — Central File
CANARY — Local School
PINK — Building Nurse
GOLDENROD — Speech Clinician or Other

124

yp

FEB 11 1981

1.2

dallas independent school district

HEALTH INFORMATION

Student's Name: Smith, LaRoyce Birth Date: 4 (Mo.) 23 (Day) 71 (Yr.)

Student's Identification No. 507954 Student Services No. 53817

School T. G. Terry Elem. Grade 3 Section C

Vision: R 20/20 L 20/20 Date Tested 1/28/81 (Mo. Day Yr.) Comment/Type Test Snellen

Hirschberg f Color Vision f Plus Lens f

Hearing: R P/F L P/F Date Tested 1/29/81 (Mo. Day Yr.) Comment/Type Test Screening

BRIEF HEALTH HISTORY: Date 2/3/81 Informant Mother

General health good - last seen by a doctor 12/80 for allergies (Has seasonal allergies). Takes NO med: on a regular basis. Had to wear braces at age 2-3 y/o for feces (broad knee) for 1½ years. Immun. complete.

☐ New referral

☐ Re-evaluation

☐ Yes ☐ No Nurse to participate in ARD

☐ Current Medical exam available _____ (Date of exam/Examiner)

☑ Medical pending; appt. date _____

☐ Medical exam. not indicated

☐ Specialty exam. needed/available _____ (Type)

R. Walker Date: 2/3/81
School Nurse

Form SE-22—9M—0483—79

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

dallas independent school district

PUPIL PERSONNEL COMMITTEE

Screening Report

School J. H. Terry Date 2-5-81

Student's Name Latoyce Smith Birth Date 4-23-71 Grade 3 ID. No. 507954

Father Leroy Smith Mother Johnnie Mae Smith

Child lives with parents (Relationship) Address 7427 Brierfield

Name _____ (If other than parent) Telephone: Business Father _____ Home 224-7690 Mother _____

A (N) MA Ind Or Other (Ethnicity) (M) F (Sex) Results of Language Dominance Test: (E) Sp. Other (Primary Language)

Group Tests: (give name, date administered, and results) Comp. 1.7
ITBS 1.3 Lang Vocab. Total 1.0

Reason for Referral: Academic (describe) very weak in reading spelling and math; does not retain instruction from day to day
Behavioral (describe) very short attention span; aggressive in activities
Other (describe) speech is difficult to understand.

Results of parent contact concerning student's difficulties as reflected in this referral:
Mrs. Smith was favorable.

By whom? Mrs. Phelps; Date(s) 11-80 ; 1-81

By what means? ☐ School Conference ☐ Home Visit ☐ Telephone

Action taken (list alternatives attempted with student)
1. Call to PPC
2. Plan tutoring
3. Special help after school
Homework with parent help.

RECOMMENDATIONS:

☐ Regular class placement ☐ Alternate program _____ (Type) ☐ Tutoring

☐ Counseling _____ (By Whom) ☐ Adjust individualized instruction

☐ Parent conference ☐ Refer to ARD Committee ☐ Other _____

Pupil Personnel Committee:

Daniel McKay (Administrator) — Pat Middleton (Name and Position)
Jimmy Vann - Plan A — Ruby Baker
Virginia Phelps 3rd gd. — Bobbie Anglin
Bobbie J. Penland - 3rd gr. — Donna Downey - Plan A

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

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dallas independent school district

TEACHERS' OBSERVATION CHECKLIST
FOR PUPIL PERSONNEL COMMITTEE
(To be completed by each teacher of student)

Name Smith, LaRoyce
Last First Middle

Student's Identification No. 507954 Student Services No.

Please respond to each item by marking the number which best represents your opinion of this child's behavior:

1. Definite strength; 2. Fairly strong; 3. Comparable to peers; 4. Fairly weak;
5. Definite weakness.

5 Reading (estimated grade level 2.0)
4 Arithmetic (skills, addition, subtraction, multiplication, div., etc.)
5 Spelling (estimated grade level 2.0)
3 Completes assignments
1 Attendance

2 Cooperates with teacher
1 Controls emotions
1 Relates well to peers
1 Is not disruptive
5 Attends to instruction
5 Retains instruction

5 Attention span
1 Accepted by peers
1 Respects teacher
5 Speech difficulties
Other

Have you contacted the parent regarding the student's problems? No Yes ✓

Results of contact (Date 11-80); Mrs. Smith and I discussed the possibility of having LaRoyce tested if he didn't start retaining what was presented to him. 1-81 - I sent a letter telling Mrs. Smith I was going ahead with the referral. She was agreeable in Nov.

Describe your efforts to assist this student: include alternative approaches utilized:
one to one; peer tutoring;

What type of assistance do you feel this student needs? Special Ed services

School T. G. Terry Elem.
Teacher Virginia A Phelps
Subject 3rd self-contained
Date 1-19-81

F-21—2650—8433—79

WHITE — Central File
CANARY — Local School
PINK — Building Nurse
GOLDENROD — Speech Clinician or Other

dallas independent school district

53817

HEALTH INFORMATION

Student's Name: Smith, LaRoyce Birth Date: Mo. 4 Day 23 Yr. 71

Student's Identification No. 507954 Student Services No. 53817

School T. G. Terry Elem. Grade 3 Section 7C

Vision: R 20/20 L 20/20 Date Tested Mo. 1 Day 28 Yr. 81 Comment/Type Test Illit

Hirschberg — Color Vision — Plus Lens —

Hearing: R P L P Date Tested Mo. 1 Day 28 Yr. 81 Comment/Type Test Screen

BRIEF HEALTH HISTORY: Date 2/3/81 Informant Mother

General health good - last seen by a doctor 6/80 for allergies (Has several allergies). takes NO med. on a regular basis. Has worn braces at one -- 3 yrs for about 1 and 1/2 years. Immun complete.

- [ ] New referral
- [ ] Re-evaluation
- [ ] Yes [ ] No Nurse to participate in ARD
- [ ] Current Medical exam available _____ Date of exam/Examiner
- [x] Medical pending; appt. date _____
- [ ] Medical exam. not indicated
- [ ] Specialty exam. needed/available _____ Type

_____ Date: 2/3/81
School Nurse

Form ST-22—10M—5483—79

FEB 11 1981

C 1.0

#53817

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

dallas independent school district

PUPIL PERSONNEL COMMITTEE
Screening Report

School J. G. Terry Date 2-5-81

Student's Name LaRoyce Smith Birth Date 4-23-71 Grade 3 ID. No. 507954

Father Leroy Smith Mother Johnnie Mae Smith

Child lives with parents (Relationship) Address 7427 Brierfield

Name _____ (If other than parent) Telephone: Business _____ Father _____ Home 224-7690 Mother _____

A (N) MA Ind Or Other (Ethnicity) (M) F (Sex) Results of Language Dominance Test: (E) Sp. Other (Primary Language)

Group Tests: (give name, date administered, and results) Comp. 1.7
ITBS 1.2 Lang. Vocab. Total 1.0

Reason for Referral: Academic (describe) very weak in reading spelling and math. does not retain instruction. low comprehension
Behavioral (describe) very short attention span; agressive in activities
Other (describe) speech is difficult to understand.

Results of parent contact concerning student's difficulties as reflected in this referral:
Mrs. Smith was favorable.

By whom? Mrs Phelps Date(s) 11-80 ; 1-81

By what means? ☐ School Conference ☐ Home Visit ☐ Telephone

Action taken (list alternatives attempted with student)
1. Due to me homework with parents help.
2. peer tutoring
3. special help after school

RECOMMENDATIONS:

☐ Regular class placement ☐ Alternate program _____ (Type) ☐ Tutoring

☐ Counseling _____ (By Whom) ☐ Adjust individualized instruction

☐ Parent conference ☑ Refer to ARD Committee ☐ Other _____

Pupil Personnel Committee:

Daniel A Roy (Administrator) — Pat middleton - Sp/Lang. Clinician (Name and Position)
Jenny Vines - Plan A (Name and Position) — Ruby Baker (Name and Position)
Virginia Phelps - 3rd gd. (Name and Position) — Bobbie Anglin (Name and Position)
Bobbie J Kerlin 2nd gr. — Donna Browning - Plan A

Form SE-99 — 10M — 3434

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

1.1

dallas independent school district

TEACHERS' OBSERVATION CHECKLIST
FOR PUPIL PERSONNEL COMMITTEE
(To be completed by each teacher of student)

Name Smith, La Royce
Last First Middle

Student's Identification No. 507954 Student Services No. 53817

Please respond to each item by marking the number which best represents your opinion of this child's behavior:

1. Definite strength; 2. Fairly strong; 3. Comparable to peers; 4. Fairly weak;
5. Definite weakness.

5 Reading (estimated grade level 2.0)	2 Cooperates with teacher	5 Attention span
4 Arithmetic (skills, addition, subtraction, multiplication, div., etc.)	1 Controls emotions	1 Accepted by peers
	1 Relates well to peers	1 Respects teacher
5 Spelling (estimated grade level 2.0)	1 Is not disruptive	5 Speech difficulties
3 Completes assignments	5 Attends to instruction	Other
1 Attendance	5 Retains instruction	

Have you contacted the parent regarding the student's problems? No ___ Yes ✓

Results of contact (Date 11-80) Mrs. Smith and I discussed the possibility of having LaRoyce tested if he didn't start retaining what was presented to him. 1-81 - I sent a letter telling Mrs. Smith I was going ahead with the referral. She was agreeable in Nov.

Describe your efforts to assist this student: include alternative approaches utilized:
one to one; peer tutoring;

What type of assistance do you feel this student needs? Special Ed services

School J. G. Terry Elem.
Teacher Virginia S. Phelps
Subject 3rd self-contained
Date 1-19-81

SE-81—80M—3453—79

4-27-81
DATE

130

53817
Student Services Number

TIME

dallas independent school district

DEVELOPMENTAL AND SOCIOLOGICAL INFORMATION

I. IDENTIFYING INFORMATION:

La Royce Smith	4-23-71	M	N	3	T.G. Terry	
Name of Child	Birthdate	Sex	Race	Grade	School	
Le Roy Smith	Vacuum Heat Treat	357-0394	Truck Driver			
Father's Name	Employer	Job Title	Phone			
Johnnie Smith	Mostek	assembler supervisor	323-6934			
Mother's Name	Employer	Job Title	Phone			
Step-Father	Employer	Job Title	Phone			
Step-Mother	Employer	Job Title	Phone			
Parents	7427 Brierfield	224-7690				
Child lives with	Address	Phone				

How many languages are spoken in the home? 1 The language most spoken in the home? English

Are the parents separated or divorced? No When? _____ Who has legal custody of the child? Parents Describe the child's contact with the absent parent. _____

List the names of all family members beginning with the oldest.

	NAME	BIRTHDATE	SEX	GRADE IN SCHOOL NOW	HIGHEST GRADE COMPLETED/ TECHNICAL TRAINING
Father	La Roy Smith	9-23-43	M		11
Mother	Johnnie Smith	2-20-43	F		12
CHILDREN	Myron Wilson	8-28-61	M		12
	Norvetta Smith	12-16-77	F		

Please describe what you believe your child's problems and concerns are: He is slow and has difficulty remembering what he has learned

Has your child every repeated a grade? yes Which grade? 1st

If you child was absent more than 10 days last year or this year, what were the reasons? Illness

Describe any special program or special education class that your child has been involved with. —

Please describe how your child spends time at home. He likes to play a lot, mostly outside

Does your child tire easily? yes. When playing, he will stop and rest often

Does your child seem overactive? yes Have difficulty paying attention? yes

What does your child do to get attention? He bothers his sister, makes noises, etc. He is an affectionate child and likes for you to notice him

Describe the circumstances in the home which might affect your child's school performance.

Both parents are working and do not give him enough of their time

In the home, who is responsible for most of your child's discipline? Mother

What is the most effective means of discipline you have found for this child? Nothing works best If you spank him, he is back to normal in a few minutes. If you send him to his room, etc., he will entertain himself doing something

When punished (scolded), how does your child react or behave?

When spanked, he may cry a little

III: COGNITIVE DEVELOPMENT (Begin questions at or near child's chronological age).

Behavior:

	Year	Yes	No
Smiles when she/he sees a familiar face	0 - 1		
Drops and picks up toy	0 - 1		
Finds object (toy) hidden under container	0 - 1		
Points to one body part	1 - 2		
Points to self when asked "Where is Name?"	1 - 2		
Scribbles	1 - 2		
Copies a circle	2 - 3		
Names objects that make sounds	2 - 3		
Points to big and little upon request	2 - 3		
Points to boy and girl on verbal demand	3 - 4		
Tells if object is heavy or light	3 - 4		
Counts to 3 in imitation	3 - 4		
Copies triangle on request	4 - 5	✓	
Names 8 colors	4 - 5	✓	
Counts by rote 1-20	4 - 5	✓	
Names left and right on self	5 - 6	✓	
Says letters of alphabet	5 - 6	✓	
Names days of week in order	5 - 6	✓	
Remembers holidays and special events	6 - 7	✓	
Knows phone number or address	6 - 7	✓	
Recognizes danger signs	6 - 7	✓	
Makes correct change for $1.00	7 - 8		✓
Reads comics, magazines, books	7 - 8	some	
Initiates games	7 - 8		✓
Saves money for special purchases	8 - 9		✓
Belongs to "Clubs" or has "Best friend"	8 - 9	He has	
Goes to movies, ball games, etc. with other friends	8 - 9	✓	
Runs errands, takes messages	9 - 10	✓	
Plans vacation activities (ahead of time)	9 - 10	✓	
Uses a pay telephone	9 - 10	✓	

IV: LANGUAGE DEVELOPMENT:

Does your child have any difficulty in speaking? Yes _____ No ✓

If yes, describe. _____

Is your child able to express verbally his/her needs and desires? Yes

Is your child's speech marked by any long pauses, repetitions, or difficulty getting words out? no

Does your child have difficulty in making you or anyone else in his/her environment understand him/her? No

Does your child appear upset when he fails to make himself understood? yes

Does your child seem to have difficulty paying attention? yes

Have you every suspected a hearing problem? No

V: PERSONAL DEVELOPMENT:

Describe your feelings and attitudes about this pregnancy and birth.

mother had high blood pressure and went into convulsions before and during delivery.

What was your age with this pregnancy? 28

Have you every had a miscarriage? Yes ✓ No _____ When? Before La Royce

Was this a full-term baby? Yes

Birthweight 6 lbs. 12 ozs.

Were you in labor longer than 10 hours? No

Were there any feeding problems or illnesses during the first months of life? He was very nervous at birth and had difficulty digesting his formula for three or four months

VI: DEVELOPMENTAL TASKS:

Tell me about your child's motor development Normal

Is your child's balance and coordination as good as other children the same age? Yes

Tell me when your child first:

Crawled He didn't crawl

Walked without help 11 Mo.

Was toilet trained 2 yrs.

Describe the kind of physical activity you allow your child to do at home: Whatever is normal for children his age

Tell me about your child's eating habits. He eats good

When did your child begin to feed him/herself independently? 12 Mo.

Does the family often eat together? No

Has your child had a recent weight loss or gain? No, but he is overweight

Does your child often skip breakfast? No

Does your child:

Use appropriate utensils when eating? Normal

Prepare his/her own sandwich?

Help clear the table?

Use knife for spreading?

Pour from a pitcher?

Use napkins?

Stab food with fork?

Tell me about your child's activities one hour before bedtime? Watching TV

Does your child have difficulty sleeping? No, but he talks a lot in his sleep
(Nightmares, sleepwalking, etc.)

Does your child need medication to sleep? No If yes, what is taken? _____

Does your child get at least 8-9 hours sleep each night? yes

Is your child in the habit of thumbsucking at bedtime? No

Are your child's bowel-bladder habits normal? yes

VII: FAMILY RULES:

YES	NO	
✓		Has regular routine chores? What are the chores? He helps with housework
		Are these completed? ✓
✓		Has limits on TV viewing?
✓		Has regular study time 3:30 PM Where? at the breakfast table
✓		Returns home from school at a set time? 3:00 P.M.
✓		Has a set time to come home at night?
✓		Is allowed to play anywhere in the neighborhood?
	✓	Is allowed to date?
✓		Cooperates with adult requests 75% of the time?
✓		Asks permission to use objects belonging to others 75% of the time?
✓		Joins in conversation at mealtime?
	✓	Participates in social activities? Not at the present time
✓		Has regular bedtime. 9:00 P.M.

VIII: CHILD'S FAMILY:

Has anyone else in your family had any learning problem or difficulty in school? no

Describe your child's relationship with other family members. Good

Please describe the activities that your family participates in or on a regular basis. Picnics, etc.

Which members of the family no longer live at home? —

List names of other family members or friends living in your home. —

Which member of your family does your child look up to the most? mother

Do you have a concern about drug or alcohol use in your home or community? —

Have family members been involved in counseling (psychological, psychiatric?) no

Are there any health problems which have been passed from one generation to another?
(Diabetes, Sickle Cell, etc.) Mother is diabetic.

IX: FAMILY'S EDUCATIONAL EXPECTATIONS:

What are the goals for your child in terms of education? (This is not to be interpreted as a commjtment.)
To be able to learn and cope with this world

Language: _____

Learning: _____

Socialization: _____

Physical Education: _____

Vocational: _____

Behavioral: _____

x Johnnie Smith
Signature of person providing information

ADAPTIVE BEHAVIOR SCALE ADMINISTERED:

VINELAND Yes _____ No _____
date

SOMPA Yes _____ No _____
date

OTHER Yes _____ No _____
date

Norwood King
Home-School Coordinator

*COMMENTS: _____

*To be used by person supplying information and/or Home-School Coordinator

WHITE — Psychological Services
CANARY — School
PINK — Appraisal Team

138

dallas independent school district

MAY 2 6 1981

PSYCHOLOGICAL SERVICES

XX

Case No. 53819

Name Smith, LaRoyce

School Terry Grade 3

Ethnic Group or Race N

Home Address 7427 Brierfield

Child Lives With Johnnie & LeRoy Smith (Name) parents (Relationship)

Date 81 5 6 (Year Month Day)

DOB 71 4 23

Age 10 0

Sex M

Home Phone 224-7690

Bus. Phone 323-6000/6934

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ONLY

Reason for Referral: Academic/Learning ☐ Language/Speech ☐ Behavioral/Emotional ☐ Physical Handicap ☐

Vision ☐ Hearing ☐ S. E. Re-evaluation ☐ Other

School Information: Met. Readiness %tile Other

Vision R 20/20; L 20/20 DATE

Date 1-28-81

Achievement — ITBS

Date	VOC	RC	SP	CAP	PUNC	US	TL	MR	R GAT	Ref Mat	TWS	Math Con	Math PS	TM

Hearing R P; L P

Date 1-29-81

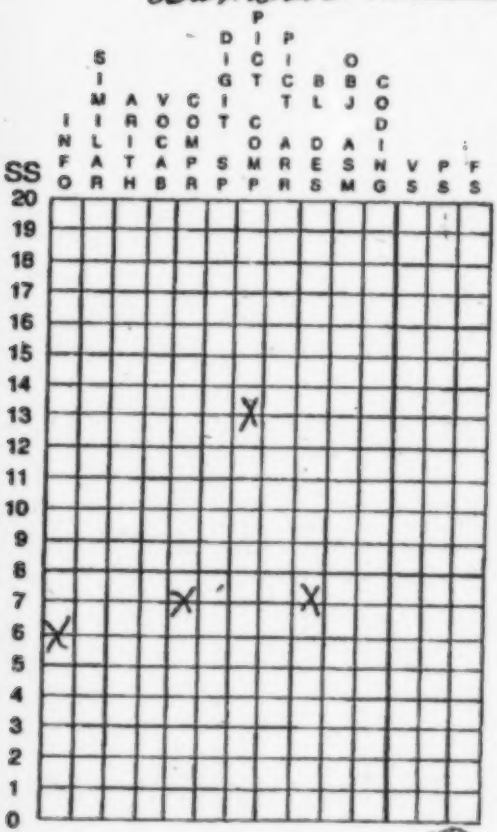
TESTS ADMINISTERED

Wechsler Intelligence Scale (WISC-R) (WAIS)

Verbal

Performance

Estimated Full Scale 88



IQ	%tile
150	99
145	99
140	99
135	99
130	98
125	95
120	91
115	84
110	75
105	63
100	50
95	37
90	25
85	16
80	9
75	5
70	2
65	1
60	1
55	1
50	1

Stanford-Binet Intelligence Scale

CA MA IQ

Wide Range Achievement Test

	GP	SS
Reading		
Spelling		
Arithmetic		

Peabody Individual Achievement Test

	GP	SS
Mathematics		
Read Rec.		
Read Comp.		
Spelling		
Gen. Info.		
Total		

Other Evaluation Instruments

Bender Gestalt
DAP
Free Choice Drawing

Previous DISD Evaluation

6-22-78 by D'Anna Morrow, Psy Assoc.
WISC-R V=88 P=87 FS=87

Data Received from Other Sources

Date Agency

Form PS-1 (Rev.)—2500—0498—81-S

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team
GOLDENROD — Parent

dallas independent school district

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REFERRAL FOR INDIVIDUAL STUDY

Comprehensive Appraisal Services

Student Services No. 53817 Date Received _____ (Month / Day / Year)

Student Identification No. 507954

Name of Pupil Smith, La Royce (Last / First / Middle) Birth Date 4-23-71 (Month / Day / Year)

Father LeRoy Smith Mother Johnnie Smith

Child Lives with Parent (Relationship) Address 7427 Brierfield

Name _____ (If other than parent) Telephone: Business Father _____ Home 224-7690

Mother 323-6000/6934

School T. G. Terry Grade 3

ETHNICITY						SEX	
1 A	(2 N)	3 MA	4 IND	5 OR	6 OTH	(1 M)	2 F

Language used in the home is primarily: (1) English 2 Spanish 3 Other (Circle One)

PARENTAL AUTHORIZATION AND CONSENT

The purpose of this request for Student Services has been discussed with me. I understand that the following services may be required:

- ✓ 1. Classroom observation
- ✓ 2. Educational appraisal
- ✓ 3. Speech and language evaluation
- ✓ 4. Family and individual background and adaptive behavior
- ✓ 5. Psychological appraisal
- ✓ 6. Medical specialty consultation mother wants DISD to do the Physical
- ✓ 7. General medical evaluation: vision and hearing testing
- ✓ 8. Physical therapy and/or occupational therapy evaluation
- ✓ 9. Other any of these as needed
- ✓ 10. Consideration for Special Education placement

Date: 4-27-81

J. Norwood King
DISD Professional Personnel Securing Authorization

Johnnie Smith
Parent or Legal Guardian

PERMISSION TO REQUEST PERTINENT INFORMATION

Permission is granted to Student Services to request pertinent information, such as

___ school records, ___ medical records, ___ sociological records, ___ psychological

and/or psychiatric reports of _____ (Student's Name)

from: _____ (Name of Agency / Address / City / State / Zip)

Date: _____ _____ (Signature of Parent or Legal Guardian)

SE-30—2M—3437—71

WHITE — Appraisal Team Central File
CANARY — Local School
PINK — Appraisal Team
GOLDENROD — Parent

dallas independent school district

2.0

REFERRAL FOR INDIVIDUAL STUDY

Comprehensive Appraisal Services

Student Services No. 53817 Date Received ____ (Month) ____ (Day) ____ (Year)

Student Identification No. 507954

Name of Pupil Smith (Last), La Royce (First) ____ (Middle) Birth Date 4 (Month) - 23 (Day) - 71 (Year)

Father LeRoy Smith Mother Johnnie Smith

Child Lives with Parent (Relationship) Address 7427 Brierfield

Name ____ (If other than parent) Telephone: Business Father ____ Home 224-7690

Mother 323-6000/6934

School T. G. Terry Grade 3

ETHNICITY						SEX	
1	2	3	4	5	6	1	2
A	(N)	MA	IND	OR	OTH	(M)	F

Language used in the home is primarily: (1) English 2 Spanish 3 Other (Circle One)

PARENTAL AUTHORIZATION AND CONSENT

The purpose of this request for Student Services has been discussed with me. I understand that the following services may be required:

- ✓ 1. Classroom observation
- ✓ 2. Educational appraisal
- ✓ 3. Speech and language evaluation
- ✓ 4. Family and individual background and adaptive behavior
- ✓ 5. Psychological appraisal
- ✓ 6. Medical specialty consultation mother wants DISD to do the physical
- ✓ 7. General medical evaluation: vision and hearing testing
- ✓ 8. Physical therapy and/or occupational therapy evaluation
- ✓ 9. Other any of these as needed
- ✓ 10. Consideration for Special Education placement

Date: 4-27-81

Norwood King
DISD Professional Personnel Securing Authorization

X Johnnie Smith
Parent or Legal Guardian

PERMISSION TO REQUEST PERTINENT INFORMATION

Permission is granted to Student Services to request pertinent information, such as

____school records, ____medical records, ____sociological records, ____psychological

and/or psychiatric reports of ____ (Student's Name)

from: ____ (Name of Agency) (Address) (City) (State) (Zip)

Date: ____ ____ (Signature of Parent or Legal Guardian)

SE-30 — 2984 — 3437 — 79

Form 3.0

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

dallas independent school district

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Page 1

Student Services Professional Report

lb
2x

Student's Name Smith (Last) LaRoyce (First) (Middle) School T. G. Terry

Student Identification No. 507954 Student Services No. 53817

Report by Alice Wilson (Name of Person) Educational Diagnostician (Profession)

Birthdate: 4-23-71
Chronological Age: 10-0
Grade: 3.8

Date 5 (Month) 6 (Day) 81 (Year)

Test administered: Woodcock-Johnson Psycho-Educational Battery

LaRoyce was referred for poor academic progress. LaRoyce willingly accompanied the examiner to the testing room. Spontaneous responses were noted. Responses to the examiner's initial questions were verbal. Investment was good. Rapport was established and was considered adequate for valid test results.

RE: Tests of Achievement:

Achievement Clusters	Grade Score	Instr. Range	Age Score	Standard Score
Reading	2.1	1.8 to 2.4	7-3	77
Mathematics	3.0	2.5 to 3.7	8-3	81
Written Language	3.0	2.3 to 3.7	8-2	83
Knowledge	2.2	1.4 to 3.4	7-8	81

At this time, LaRoyce's overall achievement level appears to be 1.1 levels below his present grade placement level.

Reading Skills and Comprehension:
He demonstrated a severe deficit in reading skills. He seems to have learned to recall words by memorizing what they look like as well as by some phonetic elements. His errors at the lower 2nd level were as follows: given got;he said get; once/ounce; point/paint; Piece/please; should/shell. He seemed to recognize some phonetic elements within the "Word Attack" samples though he did try to make real words of many of the samples. His passage comprehension skills were slightly higher than other reading tasks. He seemed to depend somewhat upon trial-error with attention to or expectation of a response from the examiner.

Mathematics Skills and Reasoning:
In his Calculations he was able to do simple addition, subtraction and basic multiplication facts. He did not attack any simple division nor was he skillful with subtraction requiring regrouping.

Written Language:
He wrote spelling words in manuscript. He seems to write the sounds as he hears them but omits letters from common spelling patterns. He recognized 2 errors out of 10 on the Proofing subtest.

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

Form 3.0

dallas independent school district

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Page 2

Student Services
Professional Report

Student's Name Smith (Last) LaRoyce (First) (Middle) School T. G. Terry

Student Identification No. 507954 Student Services No. 53817

Report by Alice Wilson (Name of Person) Educational Diagnostician (Profession)

Date 5 (Month) 6 (Day) 81 (Year)

Knowledge:
LaRoyce demonstrated somewhat limited ability to express what he knows.

Skills:
Data derived from the achievement subtest suggest that LaRoyce's basic skills, needed for successful classroom functioning, are at 2.7 grade level. The achievement subtest profile suggests possible learning problems. The instructional implications profile indicates LaRoyce is functioning with a moderate deficit in Math , Written Language, Knowledge, and with a severe deficit in Reading.

Summary:
In summary, LaRoyce seems to be performing Math and Written Language skills within normal limits of his actual grade placement while performance in reading is lower. Thus, special intervention may not be necessary at this time but may be considered in the future if significant lags are noted.

Recommendations:
1. Consideration by the LARD Committee regarding the least restrictive learning environment.
2. Conference with parents regarding test results.
3. Teach reading with a combined visual aural-oral approach. Phono-linguistics may be an appropriate method.
4. Increase his general fund of words and their meaning through word study beyond his regular spelling lesson.

EXAMINER L. Nelson Testing Date 5/6/81 Reason for Testing

WOODCOCK-JOHNSON PSYCHO-EDUCATIONAL BATTERY

RESPONSE BOOKLET

PART TWO: TESTS OF ACHIEVEMENT
PART THREE: TESTS OF INTEREST LEVEL

By Richard W. Woodcock and M. Bonner Johnson

NAME La Royce Smith

PARENT GUARDIAN

SCHOOL AGENCY T.G. Terry TEACHER DEPARTMENT

CITY STATE

ADULTS: Occupation

Education

SEX M☐ F☐

BIRTHDATE 4-23-71

AGE 10 Yrs – 0 Mos

GRADE PLACEMENT 3.8

PERCENTILE RANK PROFILE: Norms based on ☐ Subject's Grade Placement

☐ Subject's Age ☐ Other
(Local norms, some other grade level, etc.)

	1	2	5	10	20	30	40	50	60	70	80	90	95	98	99
READING															
MATHEMATICS															
WRITTEN LANGUAGE															
KNOWLEDGE															
SKILLS (Preschool)															
SCHOL INTEREST															
NONSCHOL INTEREST															

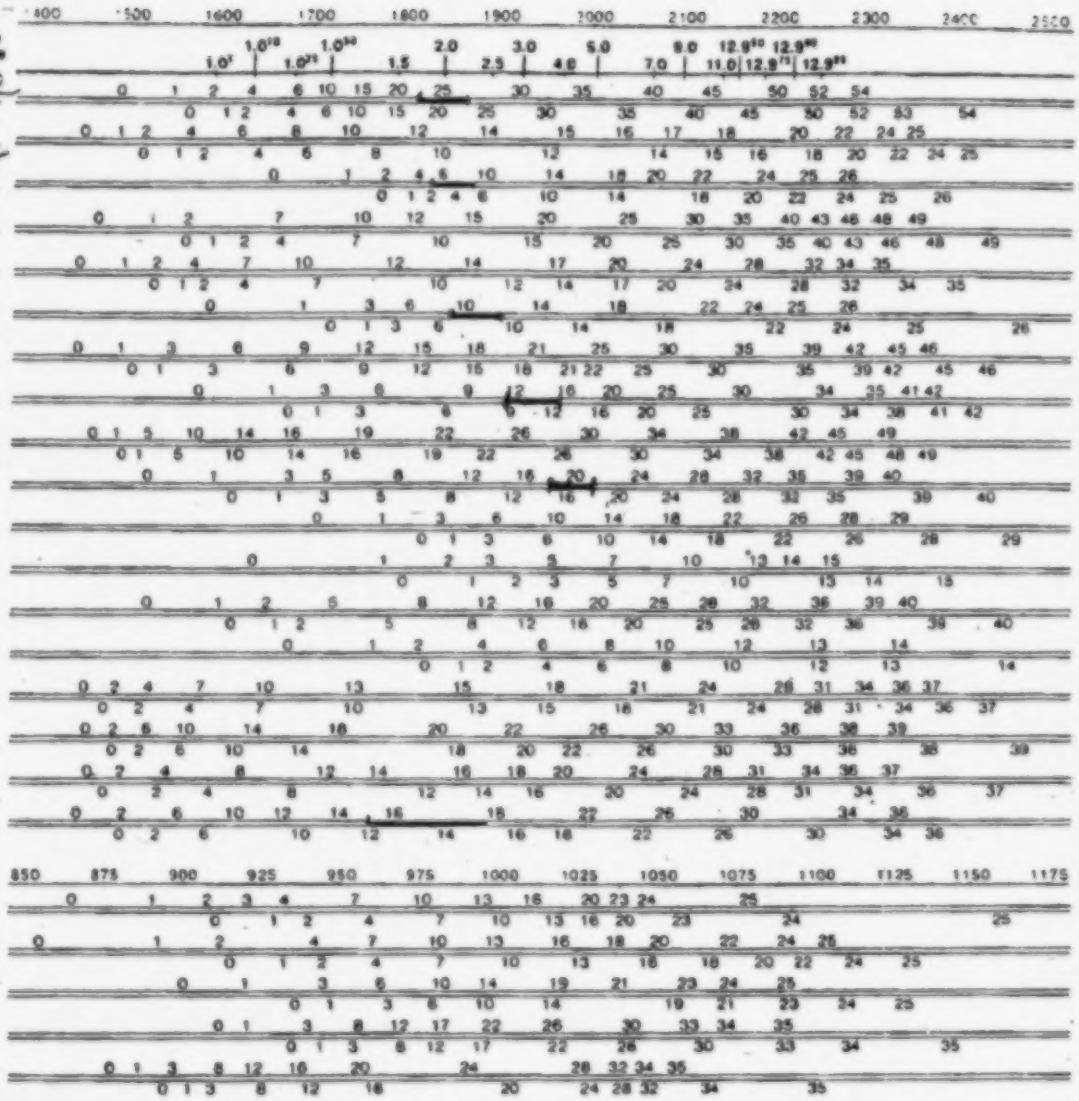
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The inside and outside cover pages of this booklet contain all test summary data and profiles and may be removed for filing purposes.

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50 Pond Park Road
Hingham, MA 02043

SUBTEST PROFILE:

Sum of Achievement Cluster Scores



INSTRUCTIONAL IMPLICATIONS PROFILE:

Instructional Range Key: Easy / Difficult — 96/90 / 75/90

READING: RPI(☐ Grade ☐ Age) = ___/90 Functioning Level ____

MATHEMATICS: RPI(☐ Grade ☐ Age) = ___/90 Functioning Level ____

WRITTEN LANGUAGE: RPI(☐ Grade ☐ Age) = ___/90 Functioning Level ____

KNOWLEDGE: RPI(☐ Grade ☐ Age) = ___/90 Functioning Level ____

1.0¹ 1.0¹⁰ 1.0²⁵ 1.0⁵⁰ 1.5 2.0 2.5 3.0 4.0 5.0 6.0 7.0 8.0 9.0 10.0 11.0 12.0 12.9¹⁰ 12.9²⁵ 12.9⁵⁰ 12.9⁷⁵ 12.9⁹⁰ 12.9⁹⁹

WISC-R RECORD FORM

Wechsler Intelligence Scale for Children—Revised

Previously tested DISD

NAME LaRoyce Smith AGE 10y SEX m
145
ADDRESS 142 y Brierfield
PARENT'S NAME LeRoy + Johnnie Smith
SCHOOL T.C. Terry GRADE 3
PLACE OF TESTING school TESTED BY B Quinn
REFERRED BY PPC

WISC-R PROFILE

Clinicians who wish to draw a profile should ~~fill~~ transfer the child's ~~scaled scores~~ to the row of boxes below. Then mark an X on the dot corresponding to the scaled score for each test, and draw a line connecting the X's.*

	VERBAL TESTS						PERFORMANCE TESTS						
	Information	Similarities	Arithmetic	Vocabulary	Comprehension	Digit Span	Picture Completion	Picture Arrangement	Block Design	Object Assembly	Coding	Mazes	
Scaled Score	6				7		13		7				Scaled Score
19													19
18													18
17													17
16													16
15													15
14													14
13							X						13
12													12
11													11
10													10
9													9
8													8
7					X				X				7
6	X												6
5													5
4													4
3													3
2													2
1													1

*See Chapter 4 in the manual for a discussion of the significance of differences between scores on the tests.

	Year	Month	Day
Date Tested	21	5	6
Date of Birth	11	4	23
Age	10	0	13

	Raw Score	Scaled Score
VERBAL TESTS		
Information	10	6
Similarities		
Arithmetic		
Vocabulary		
Comprehension	12	7
(Digit Span)	( )	( )
Verbal Score		
PERFORMANCE TESTS		
Picture Completion	21	13*
Picture Arrangement		
Block Design	15	7
Object Assembly		
Coding		
(Mazes)	( )	( )
Performance Score		

	Scaled Score	IQ
Verbal Score	*	
Performance Score	*	
Full Scale Score (estimated)		98

*Prorated from 4 tests, if necessary.

NOTES

PPC notes speech diffs.

Test observ: Artic does seem unclear at times "manuscript or courtesy?" (cursive)

Very congested w/ allergies.

* LaRoyce was very good on PC — enjoyed it too.

Repeated 1st grade.

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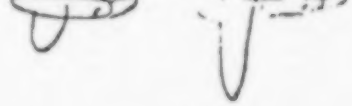
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The Psychological Corporation, New York, N.Y. 10017
74-103AS 9-990334

LaRoyce Smith

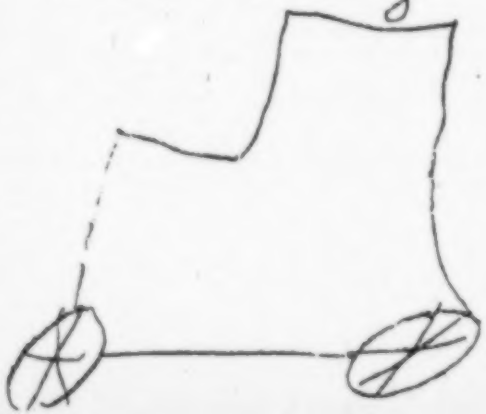


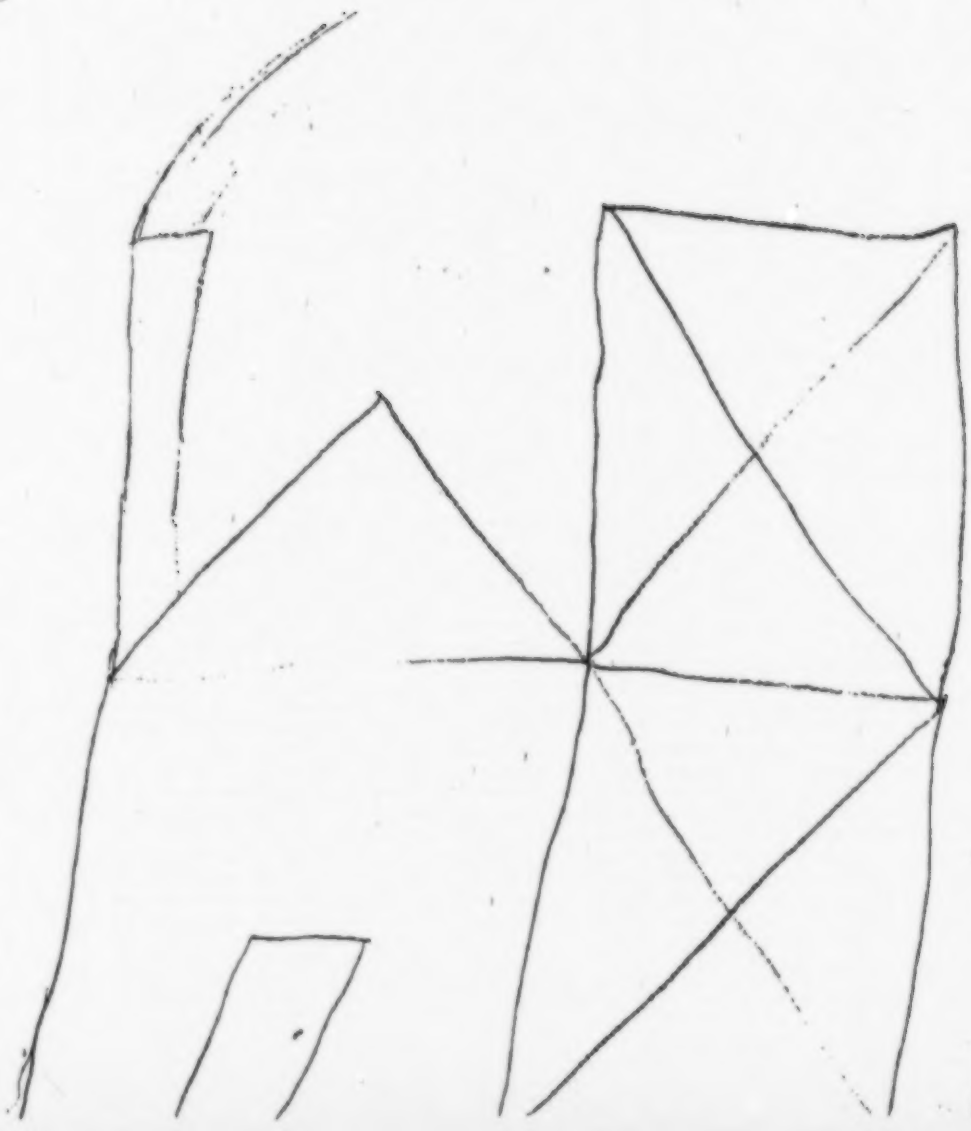
LaRoyce Smith
5-6-81
DAP

LaRoyce Smith



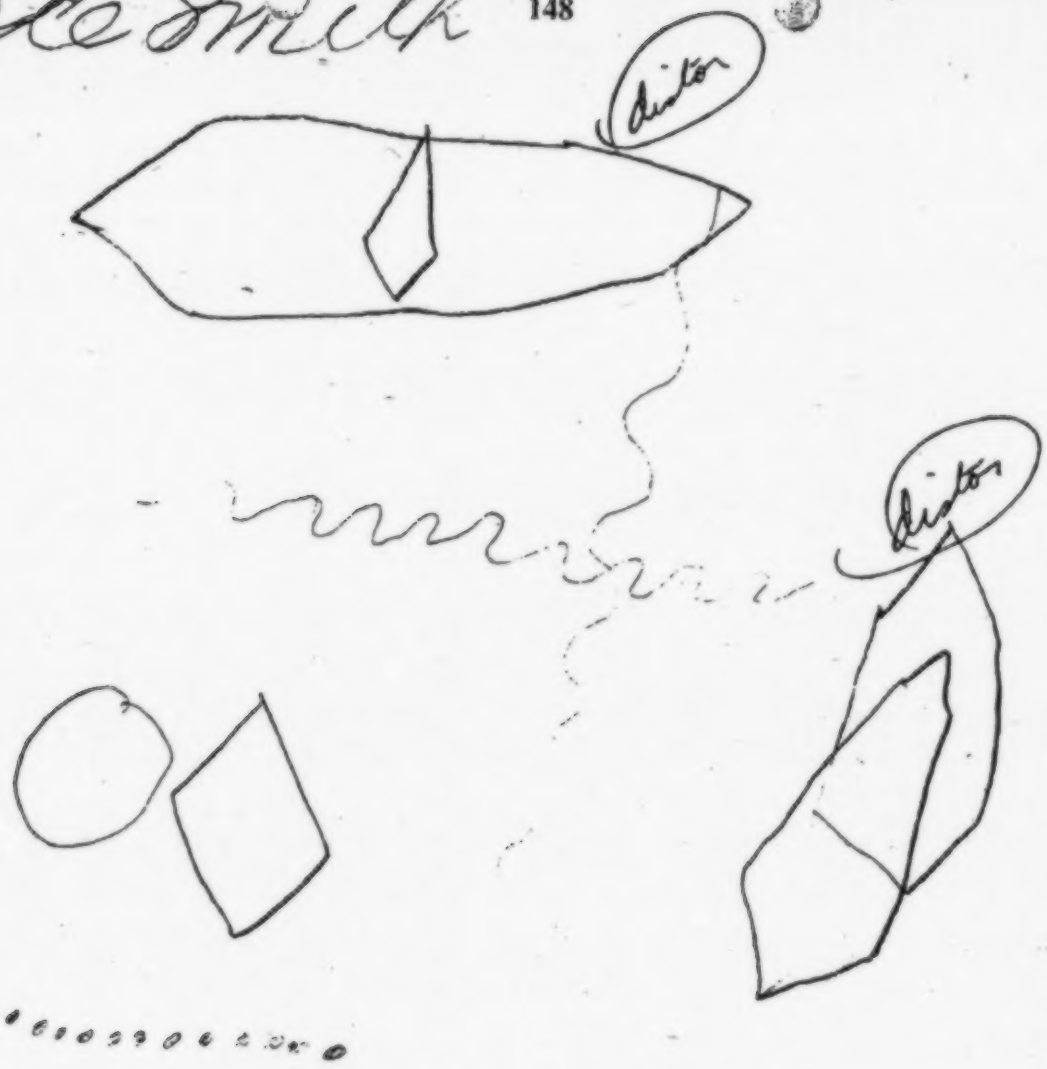
LaRoyce Smith
5-6-81
Free Choice Drawing







LaRoyce Smith 148





LaRoyce Smith
5-6-81
age 10yrs
2 errors
WNL

WHITE COPY — Special Education
CANARY COPY — Building Nurse
PINK COPY — Health Services

MAY 2 6 1981

yp

XX 507954
53817

dallas independent school district

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

5-19-81
Date

Name of Student: Smith Lt Tracy Sex M

Birth Date: 04-23-71 Ethnic Group: B

School: T. H. Terry

Dear Parent:

We are attempting to determine if your child needs special help in school. Part of the information considered in this determination is the health of your child. It will be necessary for you to take him (her) with these papers to your physician or clinic for a medical evaluation. Please sign the release form below granting the doctor permission to report his findings to my office.

To the Physician:

We would greatly appreciate the report of your medical evaluation. You are requested to mail the information on the enclosed form to my office.

This information will help us to determine the proper school placement for this child.

Sincerely yours,

R M Adams M.D.

Richard M. Adams, M. D.
Director — School Health Services
Dallas Independent School District

Release: I hereby grant permission for you to report your findings to Richard M. Adams, M. D., Director, School Health Services, Dallas Independent School District, 3700 Ross Avenue, Dallas, Texas, 75204.

see 2.0

Signature of Parent or Guardian

Form [illegible]

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

Name of Child Smith Stacy Date of Examination 9-15-81

Grade 3a Informants mother / Dutchess

	Negative	Positive	Describe Fully Any Positive Findings
MEDICAL HISTORY allergies by			C.C. seasonal x 3 years. H. of seasonal allergies. (Feb-March). Last seen by a doctor 2/81 for pulse. Tested 10 mos. ago. On a regular basis.
Current Health Problems		✓	
Significant Past History (Birth, Development, etc.)		✓	9 mos. gestation c. Neonatal death. Convulsion during labor & 1 hour. Treated & died 6 mos. Client born one miscarriage before this pregnancy.
Review of Systems		✓	Labor. Head presentation. Forceps delivery. BW. 6# 12oz. Term. III Grouper III + 3rd living. Mo. 28/10 at child birth.
Pertinent Family/Social History		✓	child Who Pt. @ birth & Nursing bond remained in hosp. for 5 days. Mo. none & baby. Epilepsy o.k. Mo. has hypertension & diabetes - grandmother, her family, 2nd. cousin died. visit cell carcinoma. Pt. also in home father joined a motorcycle Gang decided most time for family.

PHYSICAL EXAMINATION

HEIGHT	WEIGHT	VISION 1/81				HEARING 1/81	
		Without Glasses		With Glasses		Right	Left
55 1/4 (in.) cm.	99 1/4 (lbs.) kg.					Pass	Pass
% ile	% ile	Right 20/ 20	Left 20/ 20	Right 20/	Left 20/	Method Used:	Whisper
50	98						

	Normal	Abnormal	Not Examined	
GENERAL				B.P. 119/60 P 88 R ____ Head circumference: 54 cm. (50 %ile)
Head	✓			
	✓			10 Y/o BOF S. Pearly GN WD in NAD
Eyes: Pupils	✓			
Fundi	✓			
Muscles	✓			
Ears	✓			
Nose-Throat		✓		mouth breather
Teeth	✓			amalgum fillings
Lungs	✓			slight harsh - clears c coughing
Heart	✓			

To Be Completed by Physician

dallas independent school district

SUMMARY REPORT OF SPEECH AND LANGUAGE EVALUATION

Student's Name Smith, La Royce DOB 04-23-71 C.A. 10.1

School J. N. Terry Adap. Ed. # 53817 Date 5-19-81

Referred by: local ARD + teacher Reason: difficult to understand

Hearing was tested on: 1-28-81 (Date) by Pure Tone: Rt. Passed Lt. Passed

(Date) Impedance: Tympanogram Rt. _____ Lt. _____

Acoustic Reflex _____ _____

Hearing is judged to be: ✓ normal; _____ adequate for learning;

_____ Moderately deficient; _____ severely deficient

ARTICULATION: On basis of Hejna Developmental Artic Test (Test Administered), articulation skills were demonstrated as: ✓ WNL; _____ mildly, _____ moderately, _____ severely disordered.

VOICE: A voice assessment comprised of observation thru out evaluation - La Royce has allergies and was denosal revealed _____ no abnormalities; abnormalities in area of _____ phonation ✓ resonance _____ volume.

FLUENCY: On basis of a _____ word speech sample, the student demonstrated a speaking rate of _____ words per minute (WPM), and stuttered words per minute (SWM) of _____ for a fluency rate of _____%. The student was able to read at a WRM of _____ and had a SWM of _____ while reading. Secondary behaviors _____ were noted _____ not noted. A _____ mild _____ moderate _____ severe fluency problem was demonstrated;

✓ no problem with fluency was demonstrated.

ORAL STRUCTURES EXAMINATION AND FUNCTION: A peripheral examination of speech musculature revealed _____ no abnormalities; ✓ abnormalities in area of tongue elevation, cul-groove

Language: On the basis of Peabody PVC-Revised (Test Administered), receptive language is _____ at age level 3yrs 8mo below age level; TOLD Test of Lang. Development (Test Administered) expressive language is _____ at age level, ✓ (more) below age level; Utah Test of Lang. Development (Test Administered) over-all language age functioning is ✓ at age level, _____ below age level _____. Student is in need of additional evaluation for auditory discrimination.

_____ See attached ITPA Results and Interpretation Form for specific strengths and weaknesses. On basis of all tests given and additional information provided by _____, the student appears to have difficulties in _____ auditory perception, _____ verbal expression, _____ cognition. Problem could be described more specifically as in the area of _____

RECOMMENDATIONS:

_____ 1. Student appears to have speech and language skills within normal limits for C.A., and therapy does not seem warranted at this time.

✓ 2. Student should be enrolled in speech/language therapy with the Speech Clinician for the purpose of continued diagnostic therapy + work on receptive + expressive language skills.

_____ 3. Student should be referred for _____

_____ 4. Specific recommendations should be deferred until _____

_____ 5. Student's speech/language is below C.A. expectations, but appears to be attributable to cultural and/or environmental factors.

_____ 6. Other:

5-19-81 (Date) Pat Middleton (Signature of Speech Pathologist)

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

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Form 3.0

dallas independent school district
Student Services
Professional Report

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Page 1

Student's Name Smith, La Royce School T. G. Terry
(Last, First, Middle)

Student Identification No. 507954 Student Services No. 53817

Report by Pat Middleton Speech/Lang. Clinician
(Name of Person, Profession)

Date 05 - 19 - 81
(Month, Day, Year)

La Royce demonstrated articulation difficulties in conversational speech which were not present in individual word production. He dropped most final sounds and sounds were muffled as if he was very unsure of the word. Questions answered during the course of the evaluation were offend difficult to understand to unintelligable. When asked to repeat his answer he would frequently attempt to reproduce his answer or look at the examiner with a puzzled expression.

La Royce demonstrated a receptive and expressive language dificit, however, when manual language skills are combined with receptive and expressive skills overall language ability is within norms for his chronological age.

Form 3.0

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

dallas independent school district

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Page 2

Student Services
Professional Report

Student's Name Smith, La Joyce School J. G. Terry
Last First Middle

Student Identification No. 507954 Student Services No. 53817

Report by Pat Middleton
Name of Person Profession

Date
Month Day Year

The Oral Peripheal examination indicates an inability to raise tongue tip to upper lip or nose. Frenulum appeared short and tight, however, elevation to alveolar ridge is adequate. LaJoyce could not curl and groove his tongue. Diadochokinesis was slow, could not imitate rapid movement.

Voice quality was denasal due to allergies which had his nasal passage closed.

The palate is very broad and oral cavity is large which gives some phonemes and words a very hollow sound.

Auditory discrimination difficulties were demonstrated. Further testing in this area is indicated.

WHITE — Central File
CANARY — Local School
PINK — Parent

NOTIFICATION TO PARENT(S) OF ADMISSION, REVIEW AND DISMISSAL COMMITTEE MEETING

Date: 5 (Mo.) 19 (Day) 81 (Year)

To The Parents Of: LaRoyce Smith

An Admission, Review and Dismissal Committee meeting to discuss your child is being scheduled for the purpose(s) checked below:

- ✓ Admission to Special Education
- ____ Writing of the Individual Education Program
- ____ Review of the Educational Program
- ____ Review of Placement
- ____ Dismissal from Special Ed.

Your presence at this meeting is requested so that we may work cooperatively to meet the educational needs of your child to the best of our ability. We urge you to attend this meeting if at all possible.

This meeting is requested by the Local ARD

Date 5 (Mo.) 20 (Day) 81 (Year) Time 10:00 a.m.

Place Office

Please check the appropriate statement below, sign, and return this form, or if you prefer, call

— (telephone number)

Thank you for your cooperation, and we look forward to seeing you.

Sincerely,

L. Vinis (Signature)

PARENTAL RESPONSE

✓ I will attend the meeting. The date and time are acceptable.

____ I would like to attend the meeting, but cannot do so at the time suggested. Please call me at

____ (telephone number) and reschedule.

____ I will not be able to attend the ARD meeting. I understand that I will be contacted concerning the action taken at the ARD meeting.

Johnnie Smith (Signature of Parent) Date 5 (Mo.) 19 (Day) 81 (Year)

(The parent should keep the Pink copy of this form for your record)

Return the white and yellow copies of this form to:

Notice #: ____ 1; ____ 2; ____ 3.

WHITE — Permanent File
CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

4.0

JUN 9 1981

dallas independent school district

ARD/IEP COMMITTEE REPORT

JUN 9 1981 XX

Note: Record deliberations on 3.0

Date 5-20-81

Name La Royce Smith Student Services No. 53817

D.O.B. 4-23-71 Identification No. 507954

Purpose of Meeting: Initial Eligibility/Entry ✓ Annual Review ____ Other (Specify) ____

Notice of meeting sent to parents by School Date 5-19-81

Parents provided copy of Parents and Students Rights for Special Education by Home-School Coordinator Date 5-20-81

REVIEW OF INDIVIDUAL EVALUATION: The following attached reports were reviewed (note date of report)

Medical 10-6-78 Psychological 5-6-81 Educational 5-6-81 Sociological 4-27-81
Vision 1-28-81 Hearing 1-29-81 Speech 5-81 Adaptive Behavior ____
Occupational Therapy ____ Physical Therapy ____ Other ____

Review of assessment data indicates the presence of a physical, mental, emotional or speech disability:
Yes ✓ No ____

Check the handicapping condition(s) the committee found applicable:

( ) Orthopedically Handicapped	( ) Deaf-Blind	(✓) Speech Handicapped
( ) Other Health Impaired	( ) Mentally Retarded	( ) Autistic
( ) Auditorially Handicapped	( ) Emotionally Disturbed	( ) Pregnant
( ) Visually Handicapped	(✓) Learning Disabled	

If multiply handicapped, specify: Primary L.D. Secondary Speech

Review of assessment data indicates the (✓) presence ( ) absence of significant educational need. A report of student's specific learning competencies has been provided and reviewed by the ARD/IEP Committee: Yes ✓ No ____

INDIVIDUALIZED EDUCATION PROGRAM:

Current Educational Competencies (Functioning Levels) (Each area must be addressed)

List grade level or functional level for academic areas, pre-academic development or other areas of development:

Reading - grade levels 1.8 - 2.4
Writing ability - grade level abilities
Arithmetic - grade level -

Physical abilities/disabilities which would affect participation in instruction and/or P.E.:

none

Behaviors demonstrated which would affect educational programming:

sometimes forgetful or daydreams, needs structure and supervision to stay on his work sometimes. Very out-going, eager to learn, easily motivated.

Skills demonstrated which may be prerequisite to participation in vocational education (if applicable): N/A at this age.

ARD/IEP COMMITTEE REPORT

Name La Royce Smith J.D. No. 507954 Date 5/20/81 Student Services No. 53817

ANNUAL GOALS: Address all areas that apply to the student's educational needs: Academic or Pre-academic (Language Arts, Math, other); Physical Education; Behavioral (Personal, Classroom, Social); Speech; Vocational; other

Increase reading comprehension to level 2.1.

INSTRUCTIONAL SERVICES

	Subjects	Hrs/Wk	Beg.	End	Person Responsible
	Math	5/WK	8/81	5/82	Reg. Teacher
(✓) Regular	Science	3/WK	8/81	5/82	"
	Art	2/WK	"	"	"
	Music	3/WK	"	"	"
	Physical Ed.	2/WK	"	"	"
(✓) Special Ed	Language Arts	5/WK	"	"	"
	Social Studies	5/WK	"	"	"
	Reading	5/WK	8/81	5/82	Resource Teacher
(✓) Speech	Speech Therapy	1/WK	9/	5/80	Speech Clinician

( ) Vocational Education for Handicapped

Vocational Career Field _____

Cooperative Work Training _____

Describe specialized building modifications, personnel and instructional/adaptive equipment needed to implement the child's program:

N/A

PLACEMENT DECISIONS:

Level of Instruction: ( ) Pre-elementary (✓) Elementary ( ) Middle School ( ) Senior High

Campus Location: _____ Type of Special Class Resource Room

WHITE — Permanent File
CANARY — Parent/Guardian
PINK — Local School
GOLDENROD — Other

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4.0

ARD/IEP COMMITTEE REPORT

JUN 9 1981

Date 5/20/81

Name La Royce Smith I.D. No. 507954 Student Services No. 53817

RELATED SERVICES:
Describe related services to be provided to implement goals:

	Beg.	End	Person Responsible
( ) Transportation (Specify any needed adaptations)			
(✓) Other Speech Services	8/81	5/82	Speech Clinician

In brief narrative form, give justification for each service provided:

It is the opinion of the members of the committee that this child has not been placed in Special Education on the basis of: 1) only deficiencies identified as directly attributable to a different cultural life style, or to not having had education opportunities, or to not having achieved from previous educational experiences or 2) criteria which were developed solely on the command of the English language (for national origin, minority or linguistically different students only).

SIGNATURES OF THE COMMITTEE MEMBERS

I agree with decisions	I do not agree with all decisions (Comments must be attached)	Signature	
✓		Daniel C Ney	Chairman/Administrator
✓		LaRoyce Smith	Parent/Guardian
✓		Virginia A Phelps	Educational Liaison
			Diagnostician
✓		Norwood King	Home/School Coordinator
✓		Bethany H Quinn	Psychological Associate
			Health Professional
✓		Tammy Vinis	Special Education Teacher
✓		Pat Middleton	Speech Clinician
			OT/PT
			Representative of Visually Handicapped or Deaf Education
			Student
			Vocational Teacher
			Counselor
			Other

If parent or guardian was not present, designate person to follow-up with parent contact: ✓

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

Form 3.0

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Page 1

Student Services
Professional Report

Student's Name Smith, LaRoyce School T.G. Terry
(Last, First, Middle)

Student Identification No. 507954 Student Services No. 53817

Report by Norwood King Home-School Coordinator
(Name of Person, Profession)

Staffing Deliberations
Re-evaluation

Date 5-20-81
(Month, Day, Year)

LaRoyce was evaluated in 1978 and was found ineligible at that time.

The Psychologist reported that LaRoyce is functioning overall intellectually in the Low Average range. He did very well locating the missing parts in pictures but had difficulty recalling general information.

The Educational Diagnostician reported that achievement was in the low average range. Reading achievement was from grade level 1.8 to 2.4 with word attack skills somewhat limited. Math achievement was at grade level 2.5 to 3.7.

The teacher stated that LaRoyce has difficulty retaining instruction. Sometimes he acts as though he has not heard you.

The Speech Clinician reported that LaRoyce needs therapy for receptive and expressive language skills.

The Local ARD committee recommends resource room placement for reading on the basis of a Learning Disability. Speech therapy is also recommended.

For Participants in the staffing decision, see 4.0, Page 3, dated 5/20/81.

Form SE-31 (Rev.)—60M—8544—80-E

WHITE — Central Administration
CANARY — Local Building
PINK — Appraisal Team
GOLDENROD — Parent

6.0

dallas independent school district

JUN 9 1981

PARENT APPROVAL
SPECIAL EDUCATION SERVICES

Student's Name Smith (Last) La Royce (First) (Middle)

Birth Date 4 (Month) - 23 (Day) - 71 (Year) School T. G. Terry

Student Identification # 507954

Student Services No. 53817

I. SPECIAL EDUCATION RECOMMENDATIONS:

It is requested that my child receive assistance from trained specialist with his/her learning problems.

I understand that the following special education services may be provided:

✓ 1. Placement in a special education instructional program as specified in the Individualized Educational Program Resource Room (Instructional Arrangement)

2. Vocational Adjustment Class.

3. Vocational Education Instruction for the Handicapped.

4. Contractual Services.

✓ 5. Speech therapy — minimum of one hour per week.

6. Occupational therapy/physical therapy as prescribed.

7. Other (Specify) _____

I further understand that I am not obligated to accept these special services which are being offered by the Dallas Independent School District and may remove my child from such services any time I desire to do so.

I do wish my child to be placed X Johnnie Smith
Signature of Parent/Legal Guardian

II. I have been informed that Special Education Services are not recommended (at this time) and accept these recommendations. _____
Signature of the Parent/Legal Guardian

I do not wish my child to be placed _____
Signature of Parent/Legal Guardian

Date: 5 (Month) - 20 (Day) - 81 (Year) Norwood King
Signature of DISD staff member obtaining parent's permission

Comments: _____

Form SS-30 — 0694 — 3438 — 79

PINK — Local School
GOLDENROD — Other

Individual Service Plan

Name LaRoyce Smith I.D. No. Student Services No.

Date 5-20-81

Specific Educational or Support Service Resource Room Service Provider Tammy Vinies

Goal(s)

LaRoyce will: Short-Term Objective(s) (Include Evaluative Criteria)	Start Date	End Date	Review Date/ Results
1) read words with dipthongs with 90% accuracy.	9-81	11-81	11-81
2) increase sight vocabulary to a 2nd grade level.			
3) Know consonant blends and digiaphs with 90% accuracy			

160

Recommendations for Specific Materials, Procedures, or Techniques

Palo Alto Reading Series
Specific Skills
Charts

WHITE — Central File
CANARY — Local Building
PINK — Area Office

161

dallas independent school district

AREA ARD REVIEW OF LOCAL STAFFING

Student's Name Smith, LaRoyce (Last, First, Middle) Date of Review 6-16-81

Student Services No. 53817 Student Identification No. 507954

Referring School Terry Birth Date 4-23-71

Review of 5-20-81 (Date) Local ARD Staffing Copy(ies) to: Jerry Date:

Date:

Date:

COMPLETED FORMS RECEIVED:

1.0 ✓ Pupil Personnel Committee Screening Report 2-5-81

1.1 ✓ Teachers' Observations 1-19-81

1.2 ✓ Health Information — Current Vision 5-27-81 (Date) and Hearing 1-29-81 (Date) 4-27-81

2.0 ✓ Referral for Individual Study

3.0 ___ Professional Reports: Adaptive Behavior ___ (Date); Speech/Language ___ (Date);

O.T./P.T. ___ (Date); Psychological 5-6-81 (Date); Educational 5-6-81 (Date); Sociological 4-27-81 (Date)

4.0 ✓ Admission, Review, and Dismissal Report and Individualized Educational Program

4.1 ___ Eligibility for Transportation

H-56 ✓ Physical Exam (School Health Services) 10-6-78 (Date)

6.0 ✓ Parent Approval 5-20-81 (Date)

___ Parent Notification of ARD Meeting ___ (Date)

AREA ARD DECISION

Local ARD Staffing Has Been Reviewed and Found:

___ Unacceptable for following reasons:

___ Forms not received

___

___

___

___ Acceptable for 14/10/11 (Handicap)

Resource Class (Instructional Arrangement) (Grade Level)

Approved for 2 ~~5~~ Hours in Special Ed.

plus Speech

___ Eligibility not established: Justify — ___

___ Deferred: Justify — ___

___ Follow up needed: ___

9-10-81 (Date) Case completed for placement at Jerry (School)

AREA ARD COMMITTEE:

Jan Edwards — Chairperson — Special Education

Pat Covington — Nurse (Health Services)

Bert Rakowitz — Psychologist/Associate

Home-School Coordinator

Speech/Language Clinician

Other

Form 371 - SUBPOENA - CRIMINAL (FELONY)
LOCAL - DUCES TECUM - OUT OF COUNTY

THE STATE OF TEXAS
TO ANY SHERIFF OR ANY CONSTABLE OF THE STATE OF TEXAS-GREETINGS:
YOU ARE HEREBY COMMANDED to summon

RUTH TURNER OR DESIGNEE ALBERTA PINGLE
12532 NUESTRA
DALLAS TX

to be and appear before the 265 TH JUDICIAL District Court
of Dallas County, Texas, at the Courthouse of said County, in the City of Dallas, on the
05 TH day of JUNE, 1991, at 0900 o'clock A M.,
then and there to testify as a witness in behalf of the DEFENDANT in a Criminal
action pending in said Court, wherein THE STATE OF TEXAS is plaintiff, and
LAROYCE LATHAIR SMITH Defendant; No. F-9122803R.

DUCES TECUM (IF APPLICABLE) ☐ NOT APPLICABLE

and that he bring with him and produce in said Court, at said time and place,

ALL SCHOOL RECORDS OF LAROYCE LATHER SMITH B/MALE 042371

desired as evidence in said Criminal action, to-wit: in a certain suit pending in said court.

nd there remain from day to day and from term to term until discharged by the Court.

EIN FAIL NOT, But of this Writ make due return, showing how you have executed the same.

OUT OF COUNTY (IF APPLICABLE) X☐ NOT APPLICABLE

DISOBEDIENCE OF this Subpoena is punishable by fine not exceeding $500, to be collected as
nes and costs in other criminal cases.

ITNESS MY OFFICIAL SIGNATURE, THIS 04 TH day of JUNE, 1991.

BILL LONG
Clerk, District Courts
Dallas County, Texas

By C Holmes/KG Deputy
C HOLMES

NO. F-9122803-R

JUDICIAL DISTRICT COURT 265 TH
DALLAS COUNTY, TEXAS

THE STATE OF TEXAS

VS.

LAROYCE LATHAIR SMITH

CAP MUR FEL

SUBPOENA

ISSUED

This 04 TH day of JUNE, 1991

BILL LONG
Clerk, District Courts
Dallas County, Texas

By C HOLMES Deputy

ATTORNEY:
RANDY MANASCO
235 W YARMOUTH
DALLAS, TX
943-6400

REPORT TO:

FRANK CROWLEY COURTS BLDG.
133 N. INDUSTRIAL BLVD.
DALLAS, TEXAS

WHITE – Psychological Services
CANARY – School
PINK – Appraisal Team

dallas independent school district

PSYCHOLOGICAL SERVICES

Case No. 53817

Name Smith, LaRoyce

School T. G. Terry Grade 3

Ethnic Group or Race N

Home Address 7427 Brierfield

Child Lives With Johnnie & LeRoy Smith (Name)

Date: Year 81 Month 5 Day 6

DOB: 71 4 23

Age: 10 0

Sex Male

Parents (Relationship)

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Home Phone 224-7690

Bus. Phone 323-6000/6934

Reason for Referral: Academic/Learning [X] Language/Speech [X] Behavioral/Emotional [ ] Physical Handicap [ ]

Vision [ ] Hearing [ ] S. E. Re-evaluation [ ] Other

School Information: DATE Mat. Readiness %ile Other

Vision R20/20;L20/20

Date 1-28-81

Hearing R P; L P

Date 1-29-81

Achievement — ITBS

Date	VOC	RC	SP	CAP	FUNC	US	TL	MR	R GAT	Rel Mat	TWS	Math Con	Math PS	TM

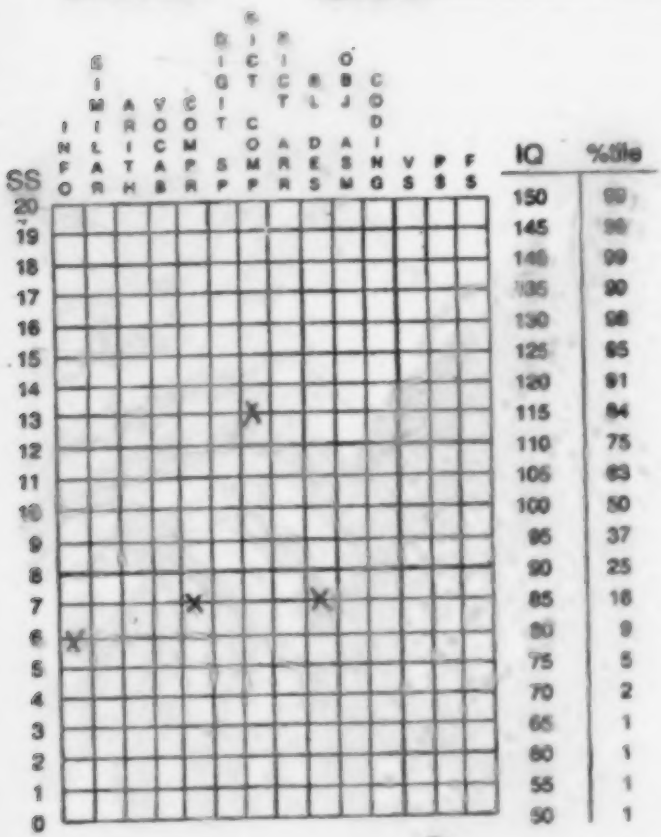
TESTS ADMINISTERED

Wechsler Intelligence Scale (WISC-R) (WAIS)

Verbal

Performance

Estimated Full Scale 88



IQ	%tile
150	99
145	99
140	99
135	99
130	98
125	95
120	91
115	84
110	75
105	63
100	50
95	37
90	25
85	16
80	9
75	5
70	2
65	1
60	1
55	1
50	1

Stanford-Binet Intelligence Scale
CA MA IQ

Wide Range Achievement Test

	GP	SS
Reading		
Spelling		
Arithmetic		

Peabody Individual Achievement Test

	GP	SS
Mathematics		
Read Rec.		
Read Comp.		
Spelling		
Gen. Info.		
Total		

Other Evaluation Instruments
Bender Gestalt
D A P
Free Choice Drawing

Previous DISD Evaluation
6-22-78 by D'Anna Morrow, Psy.Assoc.
WISC-R V=88 P=87 FS=87

Data Received from Other Sources
Date Agency

dallas independent school district

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Student Services
Professional Report

Student's Name SMITH, (Last) LA ROYCE (First) (Middle) School T. G.TERRY

Student Identification No. 507954 Student Services No. 53817

Report by Bethany H. Quinn (Name of Person) Associate School Psychologist (Profession)

Date May 6, 1981 (Month Day Year)

REASON FOR REFERRAL:

LaRoyce was referred for psychological evaluation by the Pupil Personnel Committee noting lack of academic progress and speech difficulties as areas of concern. Local school personnel report weaknesses in reading, arithmetic, spelling, ability to attend to instruction, ability to retain instruction, attention span, and speech. Relative strengths were indicated in attendance, ability to control emotions, ability to relate to peers, and respect for teacher. Alternatives attempted to date include one to one instruction and peer tutoring. LaRoyce was also previously evaluated for special education services in 1978, but found ineligible for placement at that time. It is also noted that LaRoyce repeated 1st grade.

BACKGROUND INFORMATION:

Birth and developmental information are available in previous assessment data and will not be reiterated within this report. There has not been any significant change in developmental or sociological information subsequent to LaRoyce's previous evaluation. LaRoyce is the middle child of three children and resides with his parents. Responsibilities at home include helping with housework. English is the language used in the home. Speech difficulties were noted in referral information.

OBSERVATIONS:

LaRoyce accompanied the examiner to the testing room readily and responded in a cooperative manner. Rapport was easily established and maintained. He engaged in spontaneous conversation. LaRoyce's response style was quick with limited attention to accuracy. He appeared aware of some of his errors and was self-corrective at times. Investment in evaluation tasks was excellent. Nasal congestion and trouble breathing were noted during the evaluation. Test conditions were adequate. Test results are felt to be a valid indication of current measurable functioning.

TEST RESULTS:

Current overall intellectual functioning, as estimated by a short form of the Wechsler Intelligence Scale for Children-Revised (WISC-R) is in the Low Average range of intelligence (Deviation Quotient of 88). The Bender Visual Motor Gestalt test was administered. Two errors of distortion were noted with an age equivalent score of 10 years (Koppitz), which is consistent with LaRoyce's current age. Design quality was appropriate, and no significant visual perceptual involvement was suggested. LaRoyce was self-corrective and would attempt to improve the quality of his designs. Line quality was adequate. No significant emotional involvement was suggested in referral data or during this session and projective testing was not undertaken at this time. As screening measures LaRoyce drew a human figure and a free-choice drawing which were adequate.

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

Form 3.0

dallas independent school district

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Student Services
Professional Report

Student's Name SMITH, LA ROYCE _____ School T. G. TERRY
(Last, First, Middle)

Student Identification No. 507954 Student Services No. 53817

Report by Bethany H. Quinn (Name of Person) Associate School Psychologist (Profession)

Date May 6, 1981 (Month, Day, Year)

SUMMARY:

LaRoyce is a 10 year, 0 month old student referred due to academic and speech difficulties. Current overall intellectual functioning as estimated by a short form ot the WISC-R is within the Low Average range. No significant visual perceptual problems were suggested.

RECOMMENDATIONS:

Refer to local ARD for consideration of appropriate class placement.
Refer for speech evaluation.

Bethany H. Quinn
Associate School Psychologist

Richard Hughes

Richard E. Hughes, Ph.D.
Psychologist
Psychological Services

BR

am

Original — School
PAK — Appraisal Team

dallas independent school district

INCOMPLETE
Pending Local ARD decision.

PSYCHOLOGICAL SERVICES

Sent to school AUG 0 9 1978

Case No. 53817

Name La Royce Smith

School T. G. Terry Grade 1

Ethnic Group or Race Black

Home Address 7427 Briarfield

Child Lives With Mr. & Mrs. Leroy Smith (Name)

	Year	Month	Day
Date	1978	6	22
DOB	1971	4	23
Age	7-1-29		

Sex Male

Parents (Relationship)

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Home Phone Father: 242-0444

Bus. Phone

Reason for Referral: Academic/Learning XXXXX Language/Speech ☐ Behavioral/Emotional ☐ Physical Handicap ☐

Vision ☐ Hearing ☐ S. E. Re-evaluation ☐ Other

School Information: DATE Met. Readiness %tile 7 Other

Vision R20/20 L20/20
Date 4-78

Hearing Passed
Date 2-78

Achievement — ITBS

Date	VOC	RC	SP	CAP	PUNC	US	TL	MR	R GAT	Ref Mat	TWS	Math Con	Math PS	TM
				NONE AVAILABLE										

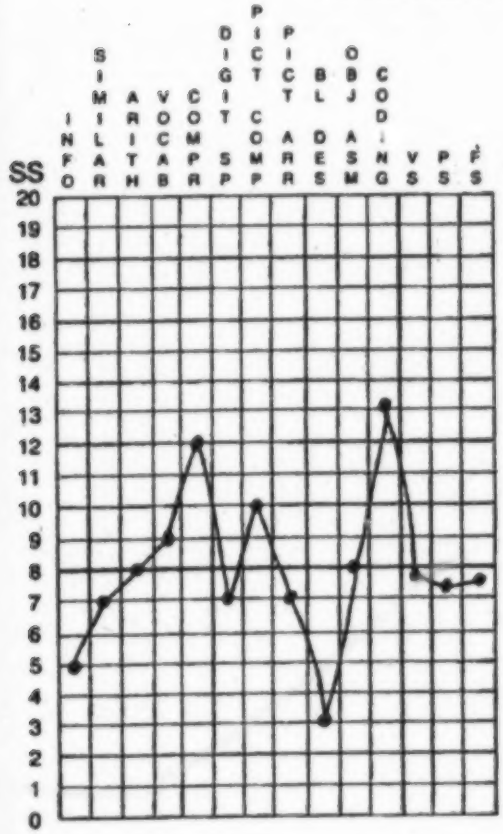
TESTS ADMINISTERED

Wechsler Intelligence Scale (WISC-R) (WAIS)

Verbal 88

Performance 87

Full Scale 87



IQ	%tile
150	99
145	99
140	99
135	99
130	98
125	95
120	91
115	84
110	75
105	63
100	50
95	37
90	25
85	16
80	9
75	5
70	2
65	1
60	1
55	1
50	1

Stanford-Binet Intelligence Scale
CA MA IQ

Wide Range Achievement Test

	GP	SS
Reading	1.4	88
Spelling	1.5	90
Arithmetic	2.4	103

Peabody Individual Achievement Test

	GP	SS
Mathematics		
Read Rec.		
Read Comp.		
Spelling		
Gen. Info.		
Total		

Other Evaluation Instruments

Bender-Gestalt

Previous DISD Evaluation

Data Received from Other Sources

Date Agency

Form PS-1 (Rev.)—3500—1000—78

dallas independent school district

ADAPTIVE EDUCATION SERVICES

Professional Report

Student's Name Smith, (Last) La Royce (First) (Middle) School T. G. Terry

Student Identification No. 507954 Adaptive Education No. 53817

Report by D'Anna Morrow (Name of Person) Psychological Associate (Profession)

Date 6 (Month) 21 (Day) 78 (Year)

La Royce Smith is a first grade student at T. G. Terry Elementary School. He was referred to Psychological Services due to low academic achievement. Ms. Adrian reported academic areas such as reading, spelling, and arithmetic to be on a kindergarten level. His school attendance is good. He completes assignments well. However, he does have difficulty attending to instruction, retaining instruction and in attention span. In the classroom, La Royce is assisted by individualized instruction, small group work, and utilization of repetition of tasks.

The Developmental and Sociological Information was obtained on June 21, 1978. Mrs. Johnnie Mae Smith, La Royce's mother completed the data. La Royce is the middle child of three children. His mother described the problem in relation to immaturity.

The health and medical history reveals that La Royce is in good general health. However, he does have frequent colds and stomach aches. The child is overly active at home. He has difficulty paying attention and is always "on the go."

The developmental history as reported by the parent seems unremarkable. During the pregnancy the mother reported excessive swelling and high blood pressure. The infant was hospitalized longer than the mother due to a hypertensive condition. He was a quiet baby. The mother further revealed that La Royce has a good family relationship. He relates best to his mother.

During testing, La Royce was a cooperative student. Rapport was easily established. Speech, hearing, and vision were adequate for testing purposes. Fine motor skills were slow and awkward. He was easily distracted and seemed developmentally immature. However, La Royce appeared to enjoy the individual attention which the testing session provided.

The Wechsler Intelligence Scale for Children-Revised was administered on June 22, 1978. The following scores were obtained: Verbal IQ: 88; Performance IQ: 87; and Full Scale IQ: 87. Relative strengths as measured by the WISC-R scaled scores were indicated in the student's ability to adapt to a new learning situation (copying symbols to shapes in a timed activity) and in common sense and reasoning ability.

Weaknesses were indicated in general knowledge of information and manipulating objects to form a whole design.

The Bender-Gestalt was administered to determine perceptual motor difficulties. La Royce used his right hand to draw each figure. The test was completed in five minutes and four seconds. According to the Koppitz scoring system, ten errors were received in distortion of shape, rotation, and integration. The mean number of errors for his age is 4.8 (standard deviation, 3.61). His performance suggests perceptual motor problems.

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CANARY — Local School
PINK — Appraisal Team

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ADAPTIVE EDUCATION SERVICES
Professional Report

Student's Name Smith, (Last) La Royce (First) (Middle) School T. G. Terry

Student Identification No. 407954 Adaptive Education No. 53817

Report by D'Anna Morrow (Name of Person) Psychological Associate (Profession)

Date 6 (Month) 21 (Day) 78 (Year)

The Wide Range Achievement Test scores were as follows: Reading, GP-1.4, Standard Score-88; Spelling, GP-1.5, Standard Score-90; Arithmetic, GP-2.4, Standard Score-103. His achievement level and intellectual functioning are commensurate. La Royce is achieving on an upper first grade level.

In summary, La Royce is a beginning second grade student who is achieving on an upper first grade level. Current psychological testing reveals that he is functioning within the low average range of intelligence. The birth and developmental history as reported by the parent seems unremarkable. His poor performance on the Bender-Gestalt suggested perceptual motor difficulties.

Recommendations:

1. Discussion of test results in local ARD.
2. Request further educational testing by the Educational Diagnostician.
3. Refer to the school nurse for a medical evaluation.

/s/ D'Anna Morrow
Psychological Associate

Ruby Morris
Ruby Morris, Ed.D.
Deputy Associate Superintendent
Student Services DK

CVS

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

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Page 1

ADAPTIVE EDUCATION SERVICES
Professional Report

Student's Name Smith (Last) La Royce (First) - (Middle) School I. G. Terry

Student Identification No. 507954 Adaptive Education No. 53817

Report by D'Anna Morrow (Name of Person) Psychological Associate (Profession)

La Royce Smith is a first grade (Date 6-21-78 Month Day Year) student at I. G. Terry Elementary School. He was referred to Psychological Services due to low academic achievement. Mrs. Adria reported academic areas such as reading, spelling, and arithmetic to be on a kindergarten level. His school attendance ~~is not good~~. He completes assignments well. However, he does have difficulty attending to instruction, retaining instruction and in attention span. In the classroom, La Royce is assisted by individualized instruction, small group work, ~~and~~ utilization of repetition of tasks.

The Developmental and Sociological Information was obtained on 6-21-78. Mrs. Johnnie Mae Smith, La Royce's mother completed the data. La Royce is the middle child of three children. His mother described the problems in relation to immaturity.

The health and medical history reveals that La Royce is in good general health. However, he does have frequent colds and stomach aches. The child is overly active at home. He has difficulty paying attention and is always "on the go".

The developmental history as reported by the parent seems unremarkable. During the pregnancy the mother reported ~~excessive~~ swelling and high blood pressure. The infant was hospitalized longer than the mother due to a hyper~~tensive~~

3.0

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Page 2

ADAPTIVE EDUCATION SERVICES
Professional Report

Student's Name Smith (Last) La Royce (First) - (Middle) School J L Long

Student Identification No. 507954 Adaptive Education No. 53817

Report by D'Anna Morrow (Name of Person) Psychological Associate (Profession)

Date 6-21-78 (Month Day Year)

Condition: [redacted] was a quiet baby.

The mother further revealed that La Royce has a good family relationship. He relates best to his mother.

During testing. La Royce was a cooperative student. Rapport was easily established. Speech, hearing, and vision were adequate for testing purposes. Fine motor skills were slow and awkward. He was easily distracted and seemed developmentally immature. However, La Royce appeared to enjoy the individual attention which the testing session provided.

The Wechsler Intelligence Scale for Children - Revised was administered on 6-22-78. The following scores were obtained: verbal IQ: 88; performance IQ: 87; and full scale IQ: 87. Relative strengths as measured by the WISC-R subtest scaled scores were indicated in the student's ability to adapt to a new learning situation (copying symbols to shapes in a timed activity) and in common sense and reasoning ability.

Weaknesses were indicated in general knowledge of information and manipulating objects to form a whole design.

The Bender Gestalt was administered to determine perceptual motor difficulties. La Royce used his right hand to draw each figure. The test was completed in five minutes and four seconds. According to the Koppitz scoring system, ten errors were received. [redacted] distortion of shape, rotation, integration. The mean number of errors for his age is 4.8 (standard deviation 3.61). His performance

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Page 3

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ADAPTIVE EDUCATION SERVICES

Professional Report

Student's Name Smith (Last) La Royce (First) - (Middle) School T. G. Terry

Student Identification No. 507954 Adaptive Education No. 53817

Report by D'Anna Morrow (Name of Person) Psychological Associate (Profession)

Date 6-21-78 (Month Day Year)

suggests perceptual motor problems. The Wide Range Achievement Test scores were as follows: reading GP: 1.4, SS: 88; spelling: GP: 1.5, SS: 90; arithmetic: GP: 2.4, SS: 103. His achievement level and intellectual functioning are commensurate. La Royce is achieving on an upper first grade level.

In summary, La Royce is a beginning second grade student who is achieving on an upper first grade level. Current psychological testing reveals that he is functioning within the low average range of intelligence. The birth and developmental history as reported by the parent seems unremarkable. His poor performance on the Bender Gestalt suggested perceptual motor difficulties.

Recommendations:

1. Discussion of test results in local ARD.
2. Request further educational testing by the Educational Diagnostician.
3. Refer to the school nurse for a medical evaluation.

Form 92-41 Rev.—3M—1/80—TS

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Student's Name LaRoyce Smith Birth Date 4 (Month) 23 (Day) 71 (Year)

Student Identification # 507954 Adaptive Education # 53817

School Information

When did this child enter DISD? 8-23-76 KINDEGARTEN (Year or Grade Level)

Previous schools, if any

Grades repeated, if any

Test Information

Metropolitan Readiness Test 9-76 (Date) 7 (% ile Rank)

Mental Maturity (CTMM)

Date	LFIQ	NLFIQ	TMFIQ

Achievement (CAT or CTBS)

Date	RV	RC	TR	LM	LE	So	TL	A Comp	A Con	A Appl	TA	TB	SSR	SSG

Other:

Spache Reading Test: ____ (Date) Word Rec. ____ Oral ____ Silent ____ Listening ____

Describe academic performance or progress and school attendance Attendance regular - performance nil - progress nil - Very low retention - has not learned all letters - cannot read simple words - cannot perform number functions beyond counting - good speech - fair handwriting - Does not know address, birthdate -

Observed interaction with peers Fair interaction with peers - Is a little rough but enjoys his friends - Must be kept seperated from a few because he's easily led into trouble.

Observed interaction with teachers or other school personnel Very hesitant to respond to teacher's questions or requests. Speaks in whispers. Tries to control actions at teacher's request but sometimes fails. Has recieved corporal punishment twice.

Principal Date Mo. Day Yr.

Nancy Adrian Teacher or Counselor Date 4-14-78 Mo. Day Yr.

Form SE-23 — 1974 — 2146 — 73

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ADAPTIVE EDUCATION SERVICES

Professional Report

Student's Name Smith (Last) LaRoyce (First) (Middle) School Terry

Student Identification No. 507954 Adaptive Education No. 53817

Report by Robbye Harper (Name of Person) Educational Diagnostician (Profession)

Date 11-13-78 (Month Day Year)

CA: 7
AGP: 1.2
Est. MA: (based on Full Scale measure) = 6-6
Expectancy Grade Level: 1.6

Reason for referral:

La Royce was referred for appraisal due to K-level performance in 1st grade with low retention of information and accompanying disruptive behavior as reported by his teacher. His teacher reports having tried small group work with a lot of repetition. Vision and hearing were within normal limits on a school screening.

Background:

His teacher reports that at the end of first grade LaRoyce could not recognize all the letters of the alphabet and could not read simple words. He can count but cannot perform number functions. He had not learned basic information as his address, birthdate, etc. which is typically known after 2 years (K and 1) in school. He appears to get along with his peers but can easily be "led into trouble". He hesitates to respond to teacher's questions and speaks in whispers

His mother completed the Developmental and Social History. She reported nothing particularly remarkable except that he has been "active" since birth and that he still seems to be very active. He is next to youngest of 3 children with a 10 year difference between himself and his older brother. His mother reported that she feels he has been petted a lot. She would like for him to do all the things a 7 year oldshould do.

A general medical exam administered in October of this year revealed nothing remarkable relative to learning problems.

Other testing:

The associate school psychologist obtained an estimate of LaRoyce's potential in the summer, 1978. Low average potential was measured overall with commensurate scores in Verbal and Performance scales. However considerable scatter was noted among subtests both in Verbal and Performance Scales. Reported weaknesses were "indicated in general knowledge of information and manipulating objects to form a whole design. Perceptual-motor problems were suspected from a measure of that kind of performance."

dallas independent school district

ADAPTIVE EDUCATION SERVICES

Professional Report

Student's Name Smith (Last) LaRoyce (First) (Middle) School Terry

Student Identification No. 507954 Adaptive Education No. 53817

Report by R. Harper (Name of Person) Ed. Diag. (Profession)

Date 11-13-78 (Month Day Year)

An achievement screening (Wide Range Achievement Test) revealed functionin commensurate with measured potential. Even higher than expected performance was noted in arithmetic.

Classroom observation:

LaRoyce observed in the regular classroom on two occasions. In both instances he seemed fidgety and it appeared to be difficult for him to maintain attention to task. He is repeating work which was done last year according to his teacher. The purpose appears to be to reinforce skills development. It may be the familiarity with the materials which interfers with attention to the task. During these two classroom observations and on 2 occasions following in which the student was retrieved for testing, he was found to be out of his seat at inappropriate times. Too, he seems to be distracted visually.

Tests administered:

Beery Developmental Test of Visual-Motor Integration
Woodcock Reading Mastery Tests
Doren Diagnostic Reading Test of Word Recognition Skills
Key Math Diagnostic Arithmetic Test

Observation during testing:

LaRoyce seemed highly distractable. He was not always able to attend to task without physical proximity to the examiner. He seemed to check withthe examiner for assurance. LaRoyce did seem to be rather entertained by the one-t one attention and may be acting out and questioning for the purpose of gaining attention.

Test Results:

The Beery VMI yielded commensurate with CA score and adequate visual-motor perception was implied. (Date of administration 9-18-78). He was required only to copy designs in close proximity. Memory was not involved in this task.

The Woodcock Reading Mastery Test yielded grade scores commensurate with potential as well as that of WRAT screening.

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ADAPTIVE EDUCATION SERVICES
Professional Report

Student's Name Smith (Last) Laroyce (First) (Middle) School Terry

Student Identification No. 507954 Adaptive Education No. 53817

Report by R. Harper (Name of Person) Ed. Diag. (Profession)

Date 11-13-78 (Month Day Year)

Subtests	R.S.	Easy L.	Read. Sc.	Fail. L.	% Ranks	S.S.
Letter ID	34	2.0	2.3	2.7	99	146
Word ID	6	1.3	1.4	1.5	82	118
Word Attack	0	1.0	1.2	1.4	54	102
Word Comp.	0	1.1	1.2	1.3	65	108
Passage Comp.	0	1.0	1.1	1.2	42	96
Total Reading	53	1.1	1.3	1.5	65	108

Word Identification and Word Attack grade scores are close to actual grade placement. Initial sounds are intact as are most consonant sounds. Vowel and common vowel combinations are grossly in error. He does not seem to recognize syllables as units within a words.

For the Word Comprehension subtest he demonstrated skill at recognizing relationships but did not have an extensive sight vocabulary to complete the task. The same was true for Passage Comprehension. The two subtests are not with expectancy at this grade level however.

Further appraisal of reading recognition skills was accomplished with the Doren Diagnostic Reading Test. Areas of greatest weakness at which to begi instruction include: Beginning sounds, word within words (discrimination of sounds by sight), and ending sounds. Though he was unable to spell any words correctly initial an final sounds were intact more than 50% of the time. His spelling achievement seems consistent with the hypothesis that Spelling follows reading achievement within 1 year.

Suggested reading goals typed directly to this test have been attached to the local school copy for reference.

Finally, the Key Math Diagnsotic Arithmetic Test was administered for purpose of identifying areas needing remediation.

Subtests	Gr. Eq.	Raw Score
Numeration	2.1	11
Fractions	1.2	1
Geometry & Symbols	1.2	8
Addition	0.8	3
Subtraction	2.0	5
Multiplication	NA	
Division	NA	

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dallas independent school district

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ADAPTIVE EDUCATION SERVICES
Professional Report

Student's Name Smith (Last) LaRoyce (First) (Middle) School Terry

Student Identification No. 507954 Adaptive Education No. 53817

Report by R. Harper (Name of Person) Ed. Diag. (Profession)

Date 11-13-78 (Month Day Year)

Subtests	Gr. Eq.	R.S.
Mental Computation	2.1	2
Numerical Reasoning	0.8	1
Word Problems	1.3	3
Missing Elements	NA	
Money	2.1	4
Measurement	1.7	5
Time	1.0	3
Total Test	1.4	46

Overall performance averaged at grade level 1.4 with a range of scores fro 0.8 on Addition to 2.1 on several subtests. LaRoyce seems to have better compu tation skills that was measured on this test of addition though he did not seem to know what to do with 2-place numbers. In dealing with basic concepts pre- sented orally with a picture cue LaRoyce performed at 2nd level. These include numeration, mental computation, money, and measurement. Computation in sub- traction was also at 2.0 level, though he was not required to work with 2-place numbers.

Goals tied to the Key Math Test are included in the local school folder. These may assist in planning.

In summary, LaRoyce has demonstrated achievement commensurate with his measured potential. Spelling and written achievement are lowest but this is no inappropriate as a reading vocabulary is generally developed prior to requiring written tasks. Overall math performance is commensurate with potential with several splinter skills well developed compared to his lowest performance. No specific learning disability is apparent at this time.

Recommendations:

1. LARD conference with parent.
2. Regular teachers may review attached goals for Word Attack and Math concepts to aid in planning.
3. Limit visual distraction as much as possible.
4. Be sure that LARoyce understands what is expected of him and that he knows the consequences for incomplete tasks.
5. Increase general fund of information by way of visual aides and group discussion. Encourage special interests or hobbies.

INTERPRETATION OF TEST RESULTS / FORM A Grade 1 ed ma 6 6.78ms

SUMMARY OF SCORES La Rayce Smith Page 1. Subject's Grade Placement (G) 1.9

TEST	Raw Score	(MS) Mastery Score TABLE I	(E) Easy Reading Level TABLE I	Relative Mastery at E	(R) Reading Grade Score TABLE I	Relative Mastery at R	(F) Failure Reading Level TABLE I	Relative Mastery at F	(MS_G) Mastery Score at G TABLE II	(MS)–(MS_G) Achievement Index (Indicate + or –)	Relative Mastery at G TABLE III	Percentile Ranks TABLE III
Letter Identification .... (45)	34	132 [1]	2.0	96%	2.3	90%	2.7	75%	87	45	+ 100 %	99
Word Identification .... (150)	6	52	1.3	96%	1.4	90%	1.5	75%	35	17	98 %	82
Word Attack ..... (50)	0	48	1.2	96%	1.2	90%	1.4	75%	46	2	92 %	54
Word Comprehension ... (70)	0	15	1.1	96%	1.2	90%	1.3	75%	7	8 [3]	96 %	6
Passage Comprehension ... (85)	0	17	1.0	96%	1.1	90%	1.2	75%	21	-4 [3]	85 %	42
(Total)		264										
TOTAL READING [2] ..... (Total ÷ 5)		53 [3]	1.1	96%	1.3	90%	1.5	75%	49	4 [3]	93 %	65

SPECIAL INSTRUCTIONS

[1] Assume a mastery score of 173 for pupils reading at grade six or above who were not administered the Letter Identification Test.

[2] Total reading score is based on the average mastery score for the five tests.

[3] Double-check all arithmetic calculations.

[4] Complete the Mastery Profile as follows:

a) place dots within each bar to represent points E, R, and F

b) draw a double-ended arrow (⟷) between each pair of E and F points to represent the instructional range

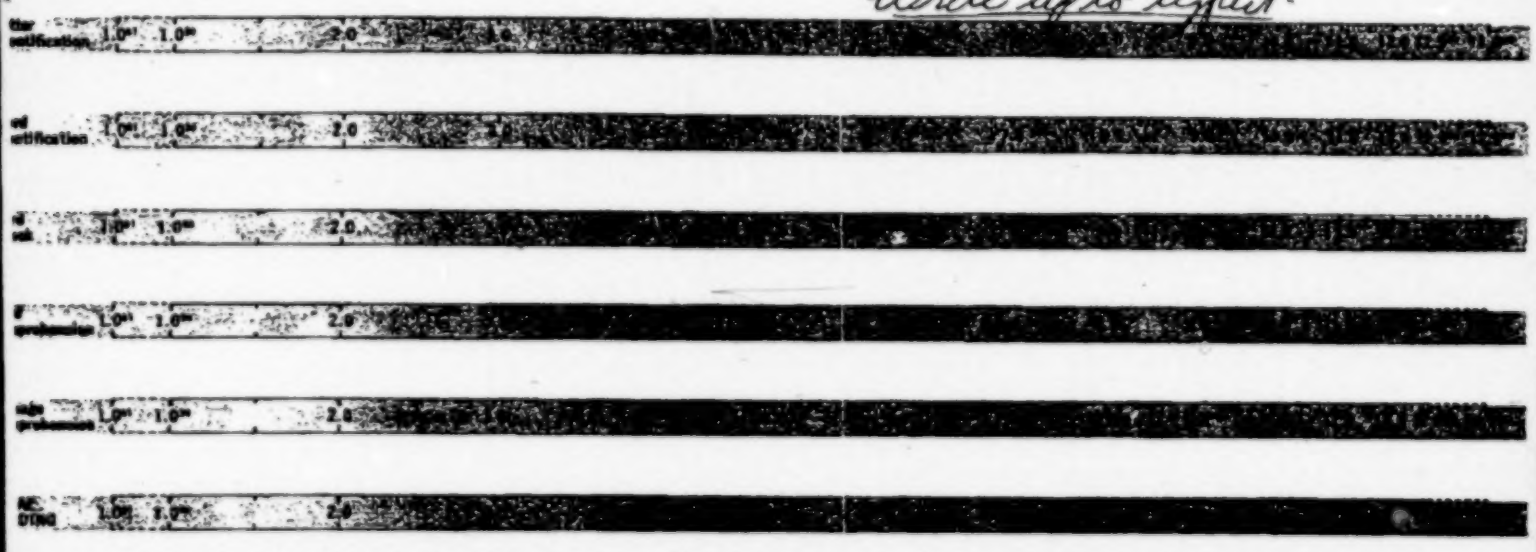
c) record, above the bar, the percent of mastery for each E, R, and F point

d) using a different color, place an "X" within each bar to represent point G

e) record, below each bar, the percent of mastery at G.

MASTERY PROFILE [4]

Write up to typist.



See the manual for additional interpretive procedures including age scores, standard scores, separate percentile rank norms for boys and girls, SES-adjusted norms, and use of the Reference Scales in criterion-referenced interpretations.

C-75-3701

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CANARY – Local School
PINK – Appraisal Team

Form 3.0

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CONFIDENTIAL
(FOR PROFESSIONAL USE ONLY)

Student Services
Professional Report

Student's Name Smith (Last) LaRoyce (First) (Middle) School T. G. Terry

Student Identification No. 507954 Student Services No. 53817

Report by Robbye Harper (Name of Person) for LARD Committee (Profession)

LARD Notes: Date 1- 8- 79 (Month Day Year)

Three invitations have been extended to this parent but could not attend. Local committee met. Local school will followup as deemed appropriate.

The Psychological Associate reported: A measure of intellectual potential administered last summer yeilded overall expectancy estimated to be within the low average range. Considerable scatter was noted among subtests with range from the mildly retarded range up to the average range. Achievement screening suggested performance above expectancy in spelling and arithmetic while reading appears to be commensurate with expectancy. No emotional problems were noted. Perceptual-motor problems were evident.

A physical examination revealed good general health with no limitations.

The Educational Diagnostician reported: LaRoyce main problem is dealing with school environment in his "fidgety" out-of-seat behavior. The teacher reported LaRoyce is repeating tasks attempted last year for the purpose of reinforcement as well as readiness for more complex tasks. Average progress was noted. Distractibility seems to be a primary interferring factor though his achievement scores suggest better than expected performance. While he demonstrated limited word attack and math reasoning skills his performance scores are commensurate with expected low average performance.

While eligibility does not appear to have been established for Special Education resource room service, his teacher suggested the remedial efforts and repetition in regular 1st grade appear to be meeting his needs at this time. His performance should be observed over the next year and re-referral may be deemed appropriate if in class performance does not improve and significant maturity in seat behavior is not observed.

Review with teacher at end of year.

STUDENT NAME LaRoyce Smith Adaptive Education Number 53817

REASON FOR REFERRAL

LaRoyce was referred for psychological evaluation
(name)

- ✓ by the Pupil Personnel Committee
- ____ by School District Personnel
- ____ by the parent
- ____ by (other-specify) attendance

noting

- ✓ lack of academic progress and speech difficulties as areas of concern. ~~as the primary concern~~.
- ____ behavioral difficulties as the primary concern.
- ____ both academic and behavioral difficulties as areas of concern.
- ____ the need for 3 year re-evaluation in keeping with the Texas Education Agency guidelines regarding periodic re-evaluation of special education students.
- ____ (other-specify) _____.

_____ is currently enrolled in special education classes as
(name)

- ____ ~~This is a~~
- ____ a mentally retarded
- ____ a language and learning disabled
- ____ an emotionally disturbed
- ____ an other health impaired
- ____ (other-specify) _____ student.

Local school personnel report weakness(es) in

- ✓ reading,
- ✓ arithmetic,
- ✓ spelling,
- ____ ability to complete assignments
- ____ attendance
- ____ cooperation with teacher
- ____ ability to control emotions
- ____ ability to relate to peers
- ✓ ability to attend to instruction,
- ✓ ability to retain instruction,
- ✓ attention span,
- ____ acceptance by peers
- ____ respect for the teacher
- and ✓ speech.
- ____ (other-specify) _____

Relative strength(s) was/were indicated in

- ____ reading
- ____ arithmetic
- ____ spelling
- ____ ~~ability to~~ complete assignments
- ✓ attendance,
- ____ cooperation with teacher
- ✓ ability to control emotions,
- ✓ ability to relate to peers,
- ____ ability to attend to instruction
- ____ ability to retain instruction
- ____ attention span
- ✓ acceptance by peers,
- and ✓ respect for teacher.
- ____ speech
- ____ (other-specify) _____

Alternatives attempted to date include

- ✓ one to one instruction and
- ✓ peer tutoring.
- ____ modified class schedule
- ____ a campus based compensatory program
- ____ involvement in a bi-lingual education program
- ____ modified instruction in the regular classroom
- ____ cross-age tutoring
- X (other-specify) LaRoyce was also previously evaluated for special education services in 1978 but found ineligible for placement at that time. It is also noted that LaRoyce repeated 1st grade.

BACKGROUND INFORMATION

____ Developmental and Sociological information was not available to the examiner at the time this report was prepared.

STUDENT NAME La Royce Smith Adaptive Education Number 53817

_____The parent _____(other-specify) was unable to provide information pertaining to the specifics of pregnancy and birth.

__✓__Birth and developmental information are available in previous assessment data and will not be reiterated within this report.

There has not been any significant change in developmental or sociological information subsequent to La Royce '(s) (name) previous evaluation. LaRoyce is the middle child of three children and resides with his parents.

_____Significant changes in developmental and sociological information include (specify):

_____

_____

_____.

*Information provided by the _____parent _____ (other-specify) indicates _____ is
(name)

_____an only child.

_____the first	of	_____two
_____the second		_____three
_____the third		_____four
_____the fourth		_____five
_____(other-specify)		_____(other-specify)

children.

He/She currently resides with the _____mother. _____father. _____natural parents. _____mother and stepfather. _____grandparent(s). _____(other-specify)_____.

The natural parents are currently _____divorced _____separated _____and there _____is _____is no contact with the absent parent.

_____Pregnancy was characterized as uneventful.
_____Labor was reported as longer than 10 hours.
_____The mother was reported to have experienced
_____bleeding or cramping in the first 6 months.
_____fever.
_____exposure to infection.
_____excessive swelling or weight gain.
_____high blood pressure.
_____(other-specify)_____

_____.

Term of pregnancy was reported as _____months and birthweight was reported as _____pounds, _____ounces.

_____reportedly remained in an incubator after the first day.
(name)

_____At birth a _____blue _____yellow color to the infant's skin was noted.

_____The infant was hospitalized longer than the mother.

_____was delivered by Caesarean section.
(name)

_____Developmental milestones were
_____reported to be within normal limits.
_____reportedly delayed.

_____Health history as reported by the parent is
_____essentially unremarkable.
_____significant. (Specify)_____

_____.

STUDENT NAME La Royce Smith Adaptive Education Number 53817

Responsibilities at home include Helping with housework.

X English ___ Spanish ___ (other-specify) ___ is ~~reported as~~ the ~~primary~~ language used in the home.

___ School personnel indicated that ___ (name) expresses himself/herself mainly in ___ (language).

The evaluation was conducted in ___ (language).

X Speech difficulties X were ___ were not noted in referral information.

*OBSERVATIONS

La Royce (name) accompanied the examiner to the testing room ✓ readily ___ hesitantly ___ (other-specify) ___ and responded in a ✓ cooperative ___ negative ___ (other-specify) ___ manner.

Rapport was ✓ easily established and maintained. ___ easily established but difficult to maintain. ___ difficult to establish but adequately maintained once established. ___ difficult to establish and maintain.

He/She ✓ engaged in spontaneous conversation. ___ responded appropriately to questions posed. ___ responded to questions with a brief one or two word reply. ___ responded to questions with gestures.

La Royce (name)'(s) response style was ___ quick and efficient. ___ slow but accurate. ✓ quick with ~~little~~ limited attention to accuracy. ___ slow with little attention to accuracy. ___ (other-specify) ___

He (name) appeared ___ unaware of his/her errors. ✓ aware of ~~his/her~~ some of errors and was self-corrective at times. ___ aware of his/her errors but was not self-corrective.

Investment in evaluation tasks was ✓ excellent. ___ adequate. ___ marginal. ___ poor. ___ marginal and is felt to have resulted in spuriously low measured results. ___ poor and is felt to have resulted in spuriously low measured results.

___ Distractibility ___ Limited attention span ___ Lack of motivation ___ Poor concentration ___ Difficulty following test directions was/were noted during the evaluation. Nasal congestion and trouble breathing were noted during the evaluation.

___ Test conditions were less than optimal and measured results may have been affected due to these circumstances.

X Test conditions were adequate.

X Test results are felt to be a valid indication of current measurable functioning.

___ Test results are not believed to be a valid estimate of current functioning and it is felt that ___ (name)'(s) capabilities exceed current measured functioning.

TEST RESULTS

Current overall intellectual functioning, as estimated by a short form of the ~~measured by the~~ Wechsler Intelligence Scale for Children-Revised (WISC-R) is in the

___ Very Superior ___ Superior ___ High Average ___ Average X Low Average ___ Borderline ___ Mentally Deficient range of intelligence (~~Full Scale~~ Deviation IQ score of 88).

STUDENT NAME La Royce Smith Adaptive Education Number 53817

_____ had a great deal of difficulty sounding out WRAT Reading and Spelling
(name)
words.

_____ was not able to successfully sound out WRAT Reading and Spelling words.
(name)

____Problems were noted with ____initial consonants ____final consonants ____vowel sounds ____consonant blends ____sound blending ____(other-specify)_____.

____On the arithmetic section of the WRAT, he/she
____was unable to correctly compute any of the written computation items.
____was successful in
____one/two digit addition ____division
____one/two digit subtraction ____fractions
____multiplication ____(other-specify)_____.

_____ experienced difficulty with ____discriminating signs
(name)
____regrouping ____carrying ____borrowing ____reversal of numbers
____(other-specify)_____.

X The Bender Visual Motor Gestalt test was administered.
Two Errors of ____integration ____perseveration ____rotation X distortion
were noted with an age equivalent score of 10 years, ~~____months~~ (Koppitz), which is
____(other-specify) consistent with LaRoyce's current age.

_____'(s) score indicates an age equivalency of from _____ to
(name)
____years in ability to integrate visual input with fine motor activity.

✓ Design quality was ✓ appropriate ____poor and ____significant ✓ no
significant ✓ visual perceptual ____emotional involvement was suggested.

____An excessive amount of time was required to complete the test.

____Designs were hastily drawn with little attention to detail.

La Royce was self-corrective and would attempt to improve the quality of
(name)
his/her designs.

_____ demonstrated a somewhat disorganized approach in terms of his/her
(name)
placement of the designs on the paper.

✓ Line quality was ____poor ✓ adequate.

____There was a faint or light line quality noted on _____'(s) drawings.
(name)

____The lines produced by _____ when copying the Bender designs were
(name)
heavy and at times overworked.

_____ demonstrated a level of development commensurate with his/her
(name)
measured intellectual functioning.

____(other Bender comments - specify)_____

_____.

✓ No significant emotional involvement was suggested in referral data or during this session and projective testing was not undertaken at this time. As screening measures LaRoyce drew a human figure and a free-choice drawing which were ~~unremarkable~~ adequate.

STUDENT NAME La Royce Smith Adaptive Education Number 53817

** ____Projective techniques administered included the
____HTP ____Draw A Person ____Rohde Sentence Completion Test
____Kinetic Family Drawing ____TED ____CAT ____TAT
____(other-specify)_____.

_____'(s) responses were brief and unrevealing and no significant emotional
(name)
involvement was suggested.

____Responses to projective items suggest that _____ is ____an anxious
(name)
____an insecure ____an angry ____a hostile ____a passive ____an impulsive
____(other-specify)_____individual.

____While emotional factors do appear to be involved in the dynamics of this case, special class placement on the basis of emotional factors does not appear warranted at this time.

**SUMMARY

La Royce is a 10 year, 0 month old student referred due to
(name)
____academic difficulties ____behavioral difficulties ✓ academic and ~~behavioral~~ speech difficulties. ____the need for 3 year re-evaluation.

Current overall intellectual functioning as ~~measured by the~~ estimated by a short form of the WISC-R is within the
____High Average ____Average X Low Average ____Borderline
____Mildly Retarded ____Moderately Retarded ____Severely Retarded ____Profoundly Retarded range.

Measured achievement was
____essentially commensurate with
____significantly below
____somewhat below
____somewhat above
____significantly above
measured intelligence in the area(s) of ____reading ____spelling and ____arithmetic

____essentially commensurate with
____significantly below
____somewhat below
____somewhat above
____significantly above
intellectual functioning in the area(s) of ____reading ____spelling ____arithmetic.

____Significant
X No significant visual perceptual problems were suggested.

____Although significant visual perceptual impairment was noted, visual perceptual skills were commensurate with measured intellectual abilities.

*RECOMMENDATIONS

X Refer to local ARD for consideration of appropriate class placement.
X Refer for speech evaluation.
____Explore available counseling resources.
____Follow-up by local building nurse.
____Obtain formal measure of adaptive behavior.
____(other-specify)_____

_____.

Barbara H Quinn
Examiner's Signature

WHITE — District Office
CANARY — Local School
PINK — Parent

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Admission, Review and Dismissal
Individualized Educational Program
Committee Report

Meeting 4-10-85
Date 3-22-85

Name Lavelyce Smith I.D. No. 5C7454 Student Services No. 53217

Date of Birth 4-23-71 School Hulcy Grade 7th

Parent/Guardian Mr. + Mrs. L. Smith Phone Numbers: Bus. _____ Home 224-7646

Home Address 7427 Brierfield Dr. K-3 School Terry

Notice of meeting sent to parents by L Hughes (Name of sender) Date 3-22-85

Purpose of ARD/IEP Meeting Annual Review & Re-eval data Date 4-10-85

I. The Committee reviewed the following data: (Include related services assessment — specify reports and dates.)

A. Assessment Reports reviewed and attached: (Indicate if reports are from another district.)

4-14-85 WISC-R: Verbal 75, Performance 84, Full Scale 78
WJ PEB II: Reading 2.6, Math 5.6, Written Language 4.2

B. Assessment data or information from the parent or student: (Include Developmental-Social information.)

4-19-84 Sociological on file

C. Assessment data or information from other school personnel, agencies or other professionals.

2-1-84 Medical update - well child
3-22-85 Competency testing - see attached report

D. Current instructional arrangement and/or related services: Resource room

II. The committee decided that the student

____ did not meet any specific eligibility criteria at this time.

✓ met the specific eligibility criteria for Transitional Learning Disabled (Handicapping condition(s))

The discussion of eligibility included the following points (specify points and persons making them):

See attached report

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Admission, Review and Dismissal/ Individualized Educational Program Committee Report

Name Lucy - Smith I. D. # [redacted] S.S. # 53217 Date 3-22-83

III. The Committee decided that this student

✓ needs special education services because of the handicapping condition(s) sited above.

_____ does not need special education services at this time.

The discussion of need for services included the following points (specify points and persons making them):

IV. The committee ensures that this student is not assigned to special education on the basis of criteria which were developed solely on the command of the English Language ✓ yes _____ no.

Discussion:

A. Adaptations of testing procedures —

B. Use of interpreter —

V. The committee ensures that this student was not placed in special education if the only deficiencies identified are directly attributable to:

A. a different cultural lifestyle based on sociological data ✓ yes _____ no.

B. not having had educational opportunities based on sociological and school data ✓ yes _____ no.

C. not having achieved from previous educational experiences based on school data ✓ yes _____ no.

Discussion:

VI. Present competencies are identified in the attached IEP assessment report in each of the following areas: _____

Academic/developmental: (Grade or age level not acceptable)

Strengths: silent reading comprehension

Weaknesses: decoding skills, oral reading skills

Physical as it affects participation in:

Instructional setting:

Physical education: none

Behavioral, as it affects:

Educational programming:

Discipline: treat as a regular student

Vocational: (When appropriate)

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WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team

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ADMISSION, REVIEW AND DISMISSAL REPORT

Student's Name LaRaye Smith School T. S. Tuy, Elem.
Birth Date 4-23-71 Date of Staffing 1-8-78
Identification No. 507954 ☑ Local ARD ☐ Area ARD
Adaptive Education No. 53817 ☐ Central ARD
Purpose of Staffing: ☐ Admission ☑ Review ☐ Dismissal Record Staffing Deliberations on 3.0
Forms Received for Local ARD (Date): 1.0 4-78; 1.1 4-78; 1.2 4-78; 2.0 a-78;
Physical 10-78; Psychological 6-78; Educational 9-78 11-78; Sociological 2-78.

STAFFING RECOMMENDATIONS

Eligible for S.E. placement on basis of:

☐ Visual Handicap
☐ Auditory Handicap
☐ Minimal Brain Injury
☐ Orthopedic or Other Health Impaired
☐ Educable Mentally Retarded
☐ Trainable Mentally Retarded
☐ Emotionally Disturbed
☐ Language and/or Learning Disability
☐ Speech Handicap
☐ Multi-handicap (Primary _____ Secondary _____)
☐ Marginal Identification
☐ Adaptive Behavior indicators were reviewed and appear to be consistent with the intellectual assessment.

Placement at _____ School

☐ Resource Room
☐ Less than 2 hours daily
☐ More than 2 hours daily
☐ Self-contained Class
☐ Early Childhood Class
☐ Developmental Center
☐ Work Activity Center
☐ Vocational Adjustment Class
☐ Speech Therapy
☐ Other _____

Specific Recommendations _____

Placement deferred due to: does not appear to be eligible for services

Further documentation and/or follow-up by (be specific)

☐ Teacher _____
☐ Educational Diagnostician _____
☐ Health Services _____
☐ Psychological Services _____
☐ Speech Clinician _____
☐ Visiting Teacher _____
☐ Counselor _____
☐ Other _____

SPECIAL EDUCATION NOT RECOMMENDED ✓ Refer to: note above.

Dismissal: ☐ Services no longer required ☐ Student moving _____
☐ Parent request ☐ Non-attendance ☐ Other _____ (location)

Parent or Guardian present: ☐ Yes ☑ No
Further parent contact by _____
Comments: Invitations have been extended to the parent

Dissenting Opinion: _____

Admission, Review and Dismissal Committee:
Chairperson _____ Administrator
_____ Teacher
_____ Health Services
_____ Diagnostician
_____ Speech Clinician
_____ Psychological Services
_____ Home-School Coordinator

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PUPIL PERSONNEL COMMITTEE
Screening Report

School T. G. TERRY Date 4-20-78

Student's Name LaRoyce Smith Birth Date 4-23-71 Grade 1 Id. No. 507954

Father Leroy Smith Mother Johnnie Mae Smith

Child lives with parents (Relationship) Address 7427 Brierfield

Name _____ (If other than parent) Telephone: Business Father 242-2444 Home ~~224-0358~~ NOT correct number Mother _____ on other party just received last week 6-18-78 Em

A	(N)	MA	Ind	Or	Other	(M)	F	(E)	Sp	Other
ETHNICITY						SEX		PRIMARY LANGUAGE		

Reason for referral:

Academic (describe) K-level in all academics; low retention; cannot pick up number quantities

Behavioral (describe) disruptive

Other See P. 3*

Action taken (list alternatives attempted with student)

1. individual instruction
2. small group work
3. Touch Repetition

Have parents been contacted about student's difficulties? ☐ Yes ☑ No

By whom? Mrs. Adrian Dates Unable contact parents

By what means? ☐ School Conference ☐ Home Visit ☐ Telephone

RECOMMENDATIONS:

☐ Regular class placement ☐ Alternate program _____ (Type) ☐ Tutoring

☐ Counseling _____ (By Whom) ☐ Adjust individualized instruction

☐ Parent conference ☑ Refer to ARD Committee ☐ Other _____

Pupil Personnel Committee:

Dr. J. O. Vandygriff (Administrator) L. Biedenharn - 2nd grade (Name and Position)

Veneeta Howell (Name and Position) A. Peterson 1st grade (Name and Position)

Virginia Phelps 3rd grade (Name and Position) Hollie McLeroy Resource Teacher (Name and Position)

Nancy Adrian - home room Teacher

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TEACHERS' OBSERVATION CHECKLIST

Legal Name Smith (Last) La Royce (First) Lothair (Middle) Birth Date 4 (Month) 23 (Day) 71 (Year)

Student's Identification # 507954 Adaptive Education # 53817

Please respond to each item by marking the number which best represents your opinion of this child's behaviors:

1. Definite strength
2. Fairly strong
3. Comparable to peers
4. Fairly weak
5. Definite weakness

- [5] Reading (estimated grade level K)
- [5] Arithmetic (skills, addition, subtraction, multiplication, division, etc.)
- [5] Spelling (estimated grade level: K)
- [2] Completes assignments
- [2] Attendance
- [4] Cooperates with teacher
- [4] Controls emotions
- [3] Relates well with peers
- [4] Is not disruptive
- [4] Attends to instruction
- [5] Retains instruction
- [4] Attention span
- [3] Is accepted by peers
- [3] Shows respect to teacher
- [ ] Other _____
- [ ] Other _____

Have you contacted the parent regarding the student's problems? No____ Yes____

Results of contact (Date _____) _____

Describe your efforts to assist this student (use backside of sheet if necessary)

Individual assistance - small group work - much repetion

What type of assistance do you feel this student needs? _____

Teacher Nancy Adrian

Subject 1st grade

Date 4-14-78

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DEVELOPMENTAL, SOCIOLOGICAL, AND HEALTH INFORMATION

Student's Name La Royce Smith

Student Identification No. 507954 Adaptive Education No. 53817

Social and Family History

Attach completed Developmental, and Sociological Information (D&SI) to this form if this is an initial referral.
D&SI completed _____ and forwarded to Central Files.
If D&S Information is not available, please explain and state known information about family constellation, number of brothers and sisters, occupation of parents, etc.

Have other family members been seen by DISD Psychological Services?

Name _____ (Last / First / Middle) Birth Date _____ (Month / Day / Year) Year Seen _____

Has this child had previous psychological or psychiatric evaluation? Date _____
DISD _____ Other agency or examiner _____

Has Visiting Teacher worked with this child or other family members? _____
DATE _____ (Month / Day / Year) _____ (V.T. or other person completing information)

Health Information (Existing data only)

Please note any known health problems (epilepsy, etc.) _____

Vision: R 20/20 L 20/20 Date Tested 4/78 Comment _____
Hearing: R P L P Date Tested 2/78 Comment _____

Has child had neurological examination? Yes - Normal Date 2/3/78
Other pertinent medical examination? _____ Date _____
Name and address of physician or agency West Park Headstart by Dr. A.L. Alfaro

Date 4 24 78 (Month / Day / Year) A Fuentes RN (School Nurse)

WHITE — Appraisal Team/Central File
CANARY — Local School
PINK — Appraisal Team
GOLDENROD — Parent

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REFERRAL FOR INDIVIDUAL STUDY

Comprehensive Appraisal Services

Adaptive Education No. 53817 Date Received 6- 21- 78 (Month Day Year)

Student Identification No. 507954

Name of Pupil Smith (Last) La Royce (First) — (Middle) Birth Date 4- 23- 71 (Month Day Year)

Father Leroy Smith Mother Johnnie Mae Smith

Child Lives with parents (Relationship) Address 7427 Brierfield

Father 2420444

Name — (If other than parent) Telephone: Business: Home

Mother

School I. G. Terry Grade 1

ETHNICITY						SEX	
1	(2)	3	4	5	6	(1)	2
A	(N)	MA	IND	OR	OTH	(M)	F

Language used in the home is primarily: (1) English 2 Spanish 3 Other (Circle One)
Language in which student is most proficient: — — — (Check One)

PARENTAL AUTHORIZATION AND CONSENT

The purpose of this request for Adaptive Education Services has been discussed with me. I understand that the following services *may* be required.

- [X] 1. Classroom observation
- [X] 2. Educational appraisal
- [X] 3. Speech and language evaluation
- [X] 4. Family and individual background information
- [X] 5. Psychological appraisal
- [X] 6. Medical consultation parent gives consent for DISD medical
- [X] 7. General medical evaluation; vision and hearing testing
- [X] 8. Consideration for Special Education placement
- [ ] 9. Other

Date: 6-21-78

D'Anna Morrow
DISD Professional Personnel Securing Authorization

Johnnie Mae Smith
Parent or Legal Guardian

PERMISSION TO REQUEST PERTINENT INFORMATION

Permission is granted to Adaptive Education to request pertinent information, such as ☐ school records, ☐ medical records, ☐ psychological and/or psychiatric reports of _____ (Student's Name)

from _____ : _____

Date: _____

_____
Parent or Legal Guardian

Form SE-30 Rev. — 8M — 1030 — 77

dallas independent school district

DEVELOPMENTAL AND SOCIOLOGICAL INFORMATION

6-21-78
Date

53817
Adaptive Ed. Number

Dear Parent:

It is the desire of the Department of Adaptive Education to have as much information as possible about your child in order to better understand the problem and to provide as much assistance as possible. Your cooperation is greatly appreciated.

Name of Child	Birthdate	Sex	Race	Grade	School
LaRoyce Smith	4-23-71	M.	Bl.	1	T.G. Terry

Father's Name	Employer	Job Title	Phone
Leroy Smith Jr.	Vocational Heat Treating	Truck Driver	357-0394

Mother's Name	Employer	Job Title	Phone
Johnnie Mae Smith	Mostek	Operator	288-0444

Step-Father	Employer	Job Title	Phone
none			

Step-Mother	Employer	Job Title	Phone
none			

Child lives with	Address	Phone
Mother & Father	7427 Brunfield	224-1823

The language most often spoken in the home is English

Are the parents separated or divorced? no When? / Who has legal custody of the child? _____. Describe the child's contact with the absent parent _____

List the names of all family members beginning with the oldest.

	NAME	Birthdate	Sex	Grade in School Now	Highest Grade Completed
Father	Leroy Smith Sr.	9-23-43	M		10th
Mother	Johnnie Mae Smith	2-20-43	F		12th
CHILDREN	Myron Tyson Wilson	8-26-61	M	11th	
	LaRoyce Lattrell Smith	4-23-71	M	1st	
	Nonetta LaShaun Smith	12-16-77	F	0	

Which members no longer live at home? _____

List the names of other people living with you. none

Please describe what you believe your child's problems and concerns are: Maybe immature - has been picked a lot

HEALTH AND MEDICAL HISTORY

Has your child's general health been good? ✓ Yes ____ No. Explain ____

Does your child usually have a yearly examination? ✓ Yes ____ No.
When was he/she last seen by a doctor or health clinic? 6-77
What was his/her last illness? ____

Has your child ever had a serious accident or been hospitalized for any reason (knocked unconscious, taken poison, overdose of pills, etc.)? ____ Yes ✓ No.
Explain ____

Please check if your child has had any of the following problems:

- no allergies (asthma, hayfever, sinus trouble, food or medicine allergy)
- no convulsion (fit, shaking spell, epileptic seizure) within 3 years
- no frequent headaches
- yes frequent colds/or sore throats
- no fainting
- yes frequent stomach aches
- no recent ear infections (past year)
- ____ other (describe) ____

Have you ever suspected a vision problem? ____ Yes ✓ No. Explain ____. Have you ever suspected a hearing problem?
✓ Yes ____ No. Explain ____

Does your child tire easily? ____ Yes ✓ No.
Has there been any recent weight loss (over 5 lbs) or gain (over 10 lbs) in the past year? ____ Yes ✓ No.
Are bowel and bladder habits normal? ✓ Yes ____ No. Explain ____

Is your child's balance and coordination as good as other children his/her age?
✓ Yes ____ No.
Does your child seem over-active (always "on the go"; difficulty paying attention at home or school; can't sit still)? ✓ Yes ____ No. Explain ____

Please list a typical day's meals for your child:

Breakfast	Lunch	Supper	Snacks
Cereal/Bacon/ Toast, Milk	Sandwich Cool Drink	Meat Veg. Potatoes	Cookies Chips

Does he/she often skip breakfast? ____ Yes ✓ No.
Recently has your child had difficulty sleeping? ____ Yes ✓ No.
Has he/she needed medicine to sleep in the past year? ____ Yes ✓ No.
Does your child get at least 8-9 hours sleep each night? ____ Yes ✓ No.
Does your child have any speech difficulty? ____ Yes ✓ No. (If yes, describe the nature of problem and any help received) ____

Does your child understand spoken directions? ✓ Yes ____ No.
Is there any other health information that you feel is important? ____ Yes ✓ No.
Explain ____

DEVELOPMENTAL HISTORY

Were any of the following conditions noted during pregnancy?

no bleeding or cramping in first 6 months
no fever
no exposure to infection (measles, etc.)
yes excessive swelling or weight gain
yes high blood pressure
no use any medicines not prescribed by doctor
____ other

Which pregnancy was this? 3rd

What was your age with this pregnancy? 28

Did you have regular visits to the doctor? ✓ Yes ____ No.

Describe any emotional or physical problems the mother had at the time or soon after the birth of this child high blood pressure

Have you ever had a miscarriage? ✓ Yes ____ No.

Did you carry this child about 9 months? ____ Yes ____ No. (If no, how long? ____)

Birth weight 6 lbs 12 oz.

What type of feeding was used for your child? Similac regular

LABOR, DELIVERY AND NEWBORN PERIOD

Were any of the following conditions present? (labor and delivery)

no labor longer than 10 hours
yes large amount of bleeding
no breathing difficult for infant
no in incubator after first day
No blue color to skin
No yellow color to skin (yellow jaundice)
No given oxygen
yes infant hospitalized longer than mother dipper - thru
no Caesarean section (operation to take the baby)
no breech delivery

Were there any feeding problems during the first month of life (colic, etc.)?
____ Yes ✓ No. Explain: ____

Describe your child's disposition or mood as a baby (happy; always crying; very quiet; etc.) Very Quiet

List the ages, (as closely as you can remember it) when your child could do the following:

7 mo sit alone
7 mo crawl
9 mo walk alone
____ feed self
22 mo toilet trained

____ knew 2-3 words
____ put two words together (Hi, Daddy, etc.)
2½ dress self (except tie shoes)
3 ride tricycle
5 or 6 ride bicycle

Please list each school your child has attended beginning with kindergarten.

NAME OF SCHOOL	CITY OR TOWN	GRADE(S)
Windsor	Dallas	Kindergarten
T. C. Jerry	Dallas	1st

Has your child ever repeated a grade? Yes Which grade? First grade

Describe the contacts you have had with school personnel (teachers, principals, visiting teachers, etc.) or community agencies (public welfare, child welfare, child guidance, etc.) concerning your child's problem.

Describe any learning problem or difficulty in school that any member of your family has had.

If your child was absent more than 10 days last year or this year, what were the reasons?

Describe the circumstances in the home which affect your child's school performance.

Describe any special program or Special Education class that your child has been involved with. None

In the home, who is responsible for most of your child's discipline? Me
When there is a conflict in the home concerning your child, how is the problem handled?

When punished, how does your child react or behave?

Please list the activities that your family participates in on a regular basis (such as visits with relatives, vacations, social organizations, sports, etc.)

If any member of your family has had psychiatric of psychological evaluations, therapy or counseling, please describe.

If chronic alcoholism, using drugs, or criminal involvement has been a problem in your family, please describe how any of these may have contributed to your child's problem.

Are there any health problems which have been passed from one generation to another?
_____ (Describe)

195

Describe your child's relationship with:

(1) Father good - needs more time w/ child

(2) Mother very close

(3) Brothers fair

(4) Sisters very good

(5) Others in the home

(6) Friends

Which member of your family does your child look up to the most? mother

What does your child do to get attention? nothing

Concerning certain family rules, please check any of the following that apply to your child:

- ___ Has a regular bedtime
- ✓ Has regular routine chores
- ___ Has regular study time
- ___ Has limits on viewing TV
- ___ Participates in social activities
- ✓ Has all kinds of friends
- ___ Returns home from school at a set time
- ___ Has a motorbike
- ___ Is allowed to play anywhere in the neighborhood
- ___ Has a car
- ___ Is allowed to date
- ✓ Has a set time to come home at night
- ___ Has a job to earn money
- ✓ Keeps self groomed well
- ___ Can Use public transportation
- ___ Goes to store alone
- ___ Goes to movie alone

Concerning certain problems, please check any of the following that your child HAS HAD and/or NOW HAS:

HAS	NOW		HAD	HAS
___	___	Slow in developing		
___	___	Physical coordination		
___	___	Thumbsucking		
___	___	Nailbiting		
___	___	Outburst of anger		
___	___	Fear of animals		
___	___	Fear of the dark		
___	___	Separation from parents		
___	___	Meeting strangers		
___	___	Hurting others		
___	___	Hurting self		
___	___	Bedwetting		
___	___	Soiling		
___	___	Head banging		
✓	✓	Overly active	on the go	

What do you hope that your child will oe able to do? all the thing that a seven year old can do

In your opinion, what do you think the school should provide for your child? program got going at early age for children - maybe it would help him

What questions do you want answered? results of evaluation - follow it up

Signature of person providing information for this questionnaire:

Johnnie Smith
Signature

6-22-78
Date

D'Anna Morrow
~~Visiting Teac~~ Psyc. Assoc.

WHITE — Remains in Adapt Ed File
CANARY — School
PINK — Psychological Associate

dallas independent school district

PSYCHOLOGICAL SERVICES

Individual Study Status Report

Name: LaRoyce Smith Case # 53817 School Terry

Psychological Associate: Morrow Date: 6-22-78

CHECKLIST FOR COMPLETED CASE

A. Forms (pink copy)

- ✓ 1.0 ✓ 2.0
- ✓ 1.1
- ✓ 1.2
- ✓ 1.3

B. Psychological Report

- ✓ Front Sheet (graph — all scores recorded: standard scores, etc.)
- ____ Stanine Sheet (graph filled in and all scores recorded)
- ____ Screening Report (Appropriate blocks checked)
- ✓ 4.0's (if applicable)

C. The Completed Report to be Routed as Checked:

- ✓ Local ARD
- ____ Area ARD Review
- ____ Area ARD Staffing
- ____ Neurological Evaluation
- ____ Psychiatric Evaluation
- ____ Other ____
- ____ Requesting further information ____
- ____ Staffing deferred pending ____
- ✓ Study read and approved as complete/incomplete by BK

Date: 7-19-78 Comments: ____

WISC-R RECORD FORM

Wechsler Intelligence Scale
for Children—Revised

ADDRESS 107

PARENT'S NAME

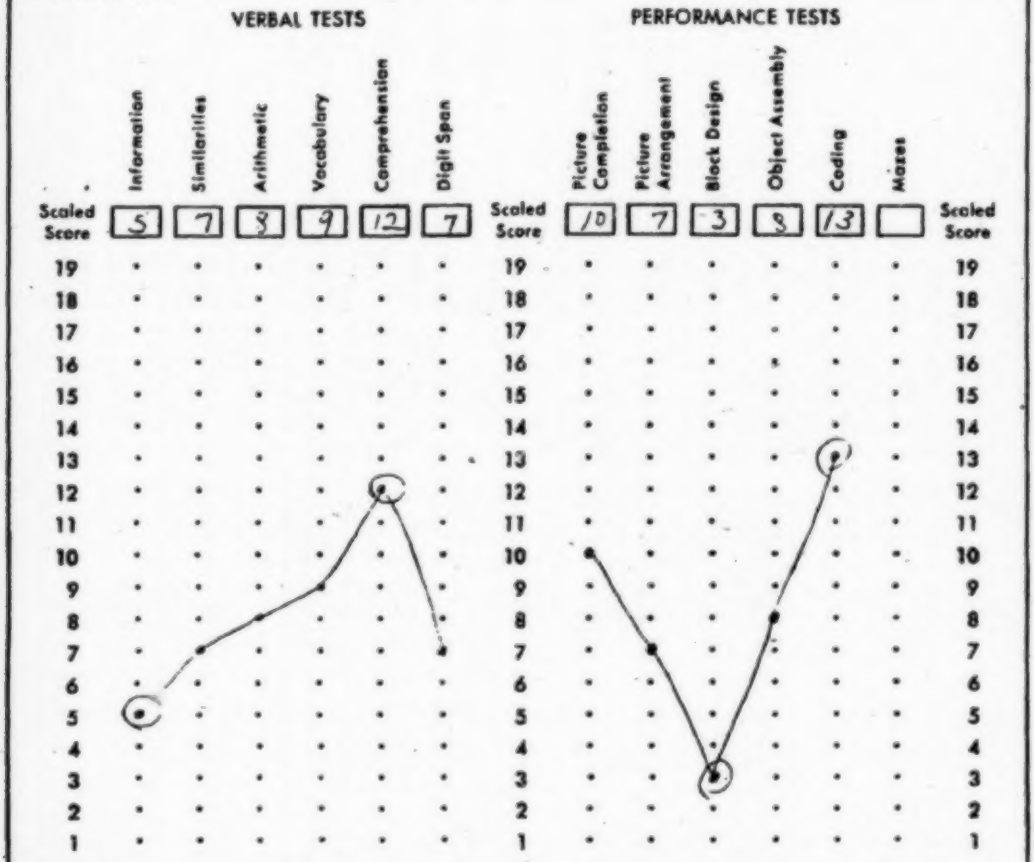
SCHOOL GRADE 1

PLACE OF TESTING TESTED BY S. Moore

REFERRED BY

WISC-R PROFILE

Clinicians who wish to draw a profile should first transfer the child's scaled scores to the row of boxes below. Then mark an X on the dot corresponding to the scaled score for each test, and draw a line connecting the X's.*



*See Chapter 4 in the manual for a discussion of the significance of differences between scores on the tests.

NOTES

	Year	Month	Day
Date Tested	1978	~~12~~ 5	~~22~~ 52
Date of Birth	1971	4	23
Age	7	1	29

	Raw Score	Scaled Score
VERBAL TESTS		
Information	4	5
Similarities	5	7
Arithmetic	6	8
Vocabulary	17	9
Comprehension	12	12
(Digit Span)	(5)	(7)
Verbal Score		41
PERFORMANCE TESTS		
Picture Completion	13	10
Picture Arrangement	7	7
Block Design	2	3
Object Assembly	9	8
Coding	45	13
(Mazes)	( )	( )
Performance Score		41

	Scaled Score	IQ
Verbal Score	41	88
Performance Score	41	87
Full Scale Score	82	87

*Prorated from 4 tests, if necessary.

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The Psychological Corporation, New York, N.Y. 10017

Printed in U.S.A.
74-103AS

WIDE RANGE ACHIEVEMENT TEST

1976 EDITION

By J. F. Jastak, S. W. Bijou, S. R. Jastak

Name La Royce Smith Sex: (M) F. Birthday 4-23-71 Chron. Age 7.1

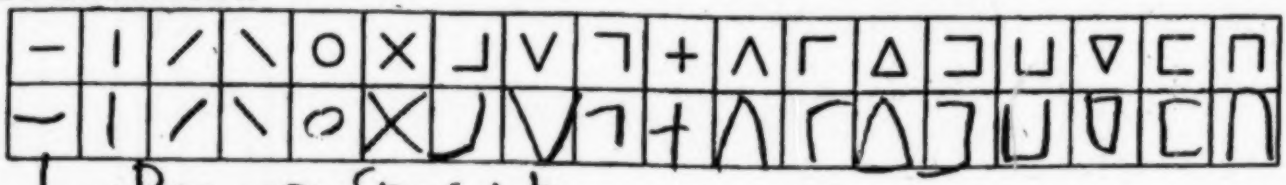
School J. D. Terry Grade 1

Referred by

Date 6-22-78 Examiner D. Morrow

Scores:	RAW	GRADE	% ILE	STAND.
Reading	29	1.4	21	88
Spelling	23	1.5	25	90
Arithmetic	24	2.1	58	103

PAGE 1: SPELLING I & II



Name LaRoyce Smith

1. gc
2. cat
3. n
4. pn
5.
6. Will
7. Ma
8. Mat
9. S
10.
11.
12. Lat
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43.
44.
45.
46.

FOR INDIVIDUAL AND GROUP COMPARISONS USE ONLY STANDARD SCORES ON PAGES 16 TO 42 OF MANUAL.

LEVEL I
Grade Norms

Raw Scores Test	Raw Scores Casual Score	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade
Copying		1	N.5	12	Kg.4	23	1.5	34	3.0	45	5.7	56	10.3
1 point per mark	1 to 18	2	N.8	13	Kg.5	24	1.6	35	3.2	46	6.0	57	10.9
		3	Pk.1	14	Kg.6	25	1.7	36	3.5	47	6.3	58	11.5
		4	Pk.2	15	Kg.7	26	1.8	37	3.7	48	6.5	59	12.2
		5	Pk.3	16	Kg.8	27	2.0	38	3.9	49	6.8	60	13.0
Name		6	Pk.5	17	Kg.9	28	2.2	39	4.2	50	7.2	61	13.8
1 letter	19	7	Pk.7	18	Gr.1.0	29	2.3	40	4.5	51	7.7	62	14.5
2 letters	20	8	Pk.9	19	1.1	30	2.5	41	4.7	52	8.2	63	15.2
Spelling		9	Kg.1	20	1.2	31	2.6	42	5.0	53	8.7	64	15.9
1 point per word	21 to 65	10	Kg.2	21	1.3	32	2.7	43	5.3	54	9.2	65	16.7
		11	Kg.3	22	1.4	33	2.9	44	5.5	55	9.7		

LEVEL II
Grade Norms

Raw Scores Test	Raw Scores Casual Score	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade	Score	Grade
Copying		0	Kg.2	11	4.0	21	6.7	31	9.0	41	12.4		
4-9	1	1	Kg.6	12	4.3	22	6.8	32	9.3	42	12.8		
10-17	2	2	Gr.1.0	13	4.6	23	7.0	33	9.6	43	13.2		
18	3	3	1.3	14	4.9	24	7.2	34	9.9	44	13.6		
		4	1.6	15	5.2	25	7.4	35	10.2	45	14.0		
Name		5	1.9	16	5.5	26	7.6	36	10.5	46	14.4		
1 letter	4	6	2.2	17	5.8	27	7.8	37	10.8	47	15.0		
2 letters	5	7	2.6	18	6.1	28	8.1	38	11.2	48	15.7		
Spelling		8	3.0	19	6.3	29	8.4	39	11.6	49	16.4		
1 point per word	6 to 51	9	3.3	20	6.5	30	8.7	40	12.0	50	17.2		
		10	3.7							51	18.0		

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Bender Gestalt
6-22-78

Cards	Time	Behavior
A	17"	∧ Rt. hand
1	54"	∧ "How many is them?" = feel like I'm making too many
2	57"	∧
3	13"	∧
4	37"	∧
5	38"	∧
6	30"	∧
7	51"	∧
8	28"	∧

$60\overline{)325.0}$ 5.41 = 5' 4"

300
250
240
100
60

C. A. = 7.1

$\bar{X}$ = 4.8

SD. = 3.61

Range = 1.2 to 8.4

4.8
3.61
8.41 = 1 SD

4.8
3.61
3.61
12.02 = 2 SD

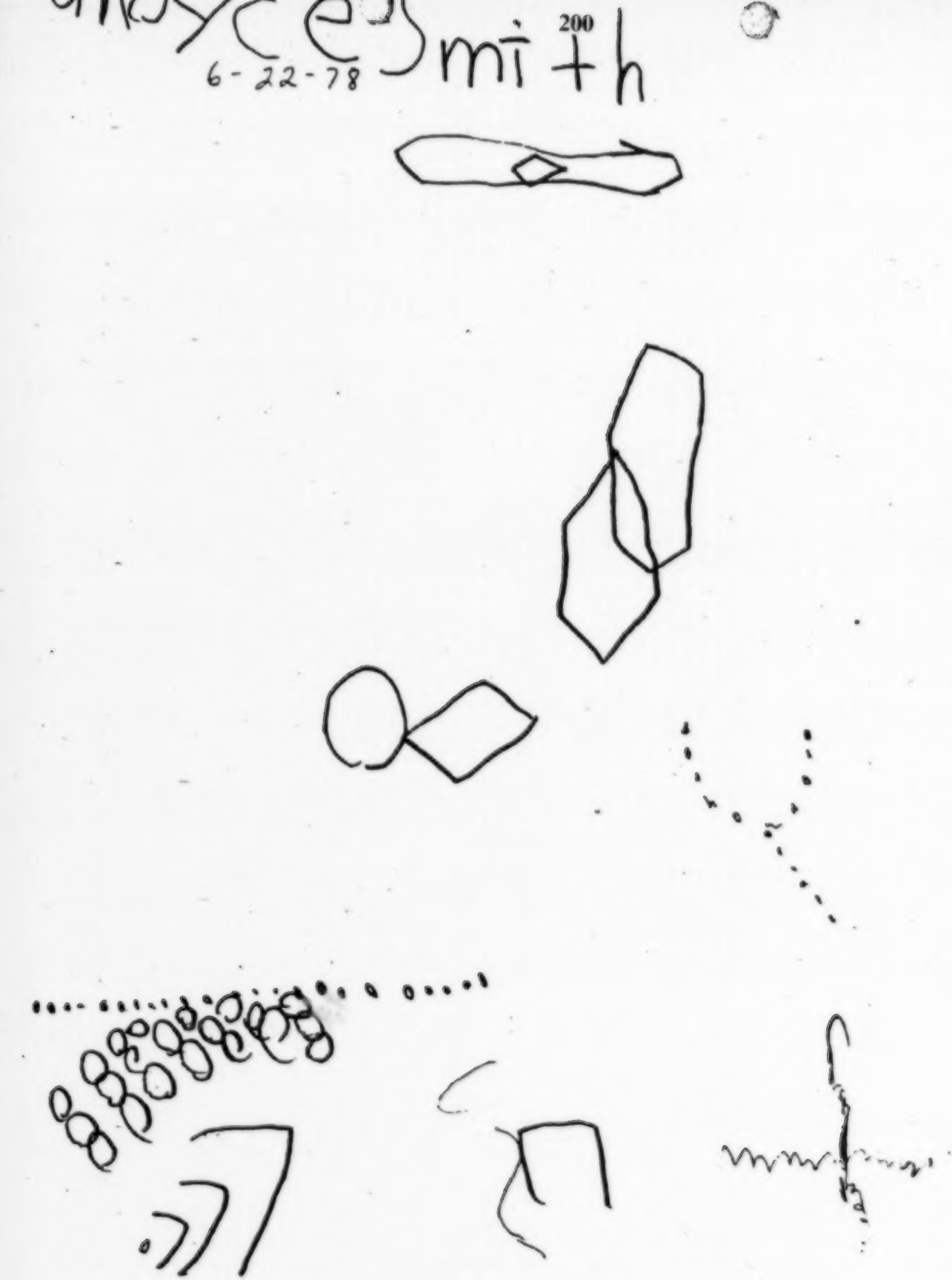
* 10 errors does suggests perceptual motor problems

Koppitz Scoring System

1	4 D
2	7 R
3	11 R
	12 I
4	13 R
5	16 R
6	18a D
7	21b D
	22 R
8	24 D

10 Errors

6-22-78



dallas independent school district

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

10/6/78
Date

Name of Student: LaRoyce Smith Sex Male

Birth Date: 4-23-71 Ethnic Group: Black

School: T.G. Terry Elementary

Dear Parent:

We are attempting to determine if your child needs special help in school. Part of the information considered in this determination is the health of your child. It will be necessary for you to take him (her) with these papers to your physician or clinic for a medical evaluation. Please sign the release form below granting the doctor permission to report his findings to my office.

To the Physician:

We would greatly appreciate the report of your medical evaluation. You are requested to mail the information on the enclosed form to my office.

This information will help us to determine the proper school placement for this child.

Sincerely yours,

R M Adams Ph.D.

Richard M. Adams, M. D.
Director — School Health Services
Dallas Independent School District

Release: I hereby grant permission for you to report your findings to Richard M. Adams, M. D., Director, School Health Services, Dallas Independent School District, 3700 Ross Avenue, Dallas, Texas, 75204.

Signature of Parent or Guardian

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

Name of Child La Royce Smith Date of Examination 10/6/78

MEDICAL HISTORY	Negative	Positive	Describe Fully Any Positive Findings
			CC. Slow learner x 1yr. 7 lbs 10 oz 3340 gm by informant. Mother to school RN Retained fetus.
Current Health Problems			dry skin behind ears & sometimes in scalp seasonal (summer & fall) # 2 of 3 siblings
Significant Past History (Birth, Development, etc.)			9-10 mo gestation c Neonatal prob. Mo. Convulsed during labor of 7 hours. Child was diagnosed as having a Nervous condition & shock mud for 2 days observed P mo. dismissed
Review of Systems			Born at St. Paul Hosp. Wt. 6 lbs no Resp. prob. Toilet @ 18-24 mo. Talked @ 9 mo. Walked @ 10 mo. @ 3 yr was seen at Scottish Rite Hosp. for genu valgum - treated by braces (nightly)
Pertinent Family/Social History			Systems - OK MO. has hypertension - has been on Rx fr. has seasonal dry skin mat. gr mo. has diabetes, 2nd cousin has Sickle cell anemia Stillborn Pat. gr mo died of ca.

PHYSICAL EXAMINATION

HEIGHT	WEIGHT	10/78 VISION				HEARING 9/78	
		Without Glasses		With Glasses		Right	Left
50 in. / cm.	66 lbs. / kg.	Right	Left	Right	Left	P	P
50 % ile	90 % ile	20/25	20/20	20/	20/	Method Used:	Pure tone 21

GENERAL	Normal	Abnormal	Not Examined	
				B.P. 90/60 P 78 R ____ Head circumference: 53 cm. (60 %ile)
Head	✓			
Eyes: Pupils	✓			
Fundi	✓			
Muscles	✓			
Ears	✓			
Nose-Throat	✓			RHINORRHEA
Teeth	✓			CARIES
Lungs	✓			
Heart	✓			RA 5 GALLOP AT (II) PULSES 2+ = BRAT.

To Be Completed by Physician

CANARY COPY — Building Nurse
PINK COPY — Health Services

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

Name of Child Ja Reyce Smith Date of Examination 10/6/72

To Be Completed By Physician

	Normal	Abnormal	Not Examined	Describe Fully Any Abnormal Findings
GENERAL *(Continued)*				
Genitalia and Abdomen	✓			
Bone-Joint Muscle	✓			
Skin	✓			
NEUROLOGICAL				
Orientation	✓			
Cooperation	✓			
Behavior	✓			
Gait/Balance	✓			
Coordination:	✓			
Gross	✓			
Fine	✓			
Sensory	✓			
Reflexes	✓			2+ = BIMAT. ⊖ BABINSKI
Cranial Nerves	✓			
Speech	✓			

Please circle:

1) This patient (does; does not) have evidence of seizure disorder, significant hyperactivity or progressive neurologic disease.

2) This examination (does; does not) suggest the presence of static neurologic deficit or developmental delay.

Explanation: _____

HISTORY AND PHYSICAL EXAMINATION

SCHOOL HEALTH SERVICES

Name of Child LaRoyce Smith Date of Examination 10/6/75

MEDICAL DIAGNOSIS: ① SLOW LEARNER by Hx - ? NEUROLOGICAL CONDITION AS NEONATE
② CARIES

RECOMMENDATIONS: ① NO LIMITATIONS FOR PHYS. ED. NOTED AT THIS TIME.

Educational Implications: ☑ Yes ☐ No

Explanation: _____

Will follow-up be needed?
☐ Yes ☑ No

When? _____

Signed Richard M. Adams ~~D.O.~~ M. D.
(Physician)

_____
(Name Printed)

_____
(Address)

_____ _____
(Zip Code) (Telephone)

Thank you for providing this information. It will be helpful in making the appropriate recommendation for school placement.

Sincerely yours,

Richard M. Adams M. D.

Richard M. Adams, M. D.
Director — School Health Services
Dallas Independent School District

(3)

No. 05-11304

FILED
NOV 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LAROYCE LATHAIR SMITH,
Petitioner,

v.

STATE OF TEXAS,
Respondent

On Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF FOR PETITIONER

CAROL S STEIKER
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-5457

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Austin, Texas 78705
(512) 232-1346

* *Counsel of Record for Petitioner*

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CAPITAL CASE

QUESTIONS PRESENTED

1. In *Smith v Texas*, 543 U.S. 37 (2004), this Court summarily reversed the Texas Court of Criminal Appeals and found constitutional error under *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), and *Penry v Johnson*, 532 U.S. 782 (2001) (*Penry II*). Is it consistent with this Court's remand in this case for the Texas Court of Criminal Appeals to deem the error in Petitioner's case harmless based on its view that jurors were in fact able to give adequate consideration and effect to his mitigating evidence notwithstanding this Court's conclusion to the contrary?

2 Can the Texas Court of Criminal Appeals, based on a procedural determination that it declined to adopt in its original decision which was summarily reversed by this Court, impose on remand a heightened standard of harm ("egregious harm") to avoid rectifying the constitutional violation found by this Court?

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS

The caption of the case contains the names of all parties to the proceedings in the lower courts and here.

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1. The CCA's reliance on the purportedly clear explanation of the nullification instruction on voir dire cannot be squared with this Court's decision. Moreover, the record in this case confirms this Court's concerns about the inefficacy of the nullification instruction. 16

2. The CCA relied upon a finding that the prosecutor did not contribute to the dilemma posed by the nullification instruction. That finding flouts a contrary finding made by this Court and is belied by the record. 22

3. The CCA's insistence that the scope and power of LaRoyce's mitigating evidence ameliorated the constitutional violation in this case cannot be squared with this Court's conclusion that the special issues in combination with the nullification instruction did not provide an adequate vehicle for the consideration of LaRoyce's evidence. In fact, the CCA's acknowledgement of the extent and force of LaRoyce's evidence compels the conclusion that the error identified by this Court cannot be deemed harmless. 25

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The opinion of the Texas Court of Criminal Appeals is reported as *Ex parte LaRoyce Lathair Smith*, 185 S.W. 3d 455 (Tex. Crim. App. 2006). JA: 269.

JURISDICTION

On March 1, 2006, the Texas Court of Criminal Appeals issued its opinion denying Smith's application for a writ of habeas corpus. *Ex parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006). No petition for rehearing was filed.

The Court has jurisdiction to review the decision of the Texas Court of Criminal Appeals pursuant to 28 U.S.C. § 1257(a) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the Eighth Amendment to the Constitution of the United States, which provides in relevant part, "nor [shall] cruel and unusual punishments [be] inflicted," and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Course of Proceedings

This Court summarily reversed the Texas Court of Criminal Appeals ("CCA") on the merits of this case in *Smith v Texas*, 543 U.S. 37 (2004). JA: 225. The matter is again before this Court after the CCA denied relief on remand.

LaRoyce Smith was convicted of capital murder and sentenced to death in Dallas County, Texas, in June 1991. The CCA affirmed his conviction and sentence in June 1994. *Smith v. State*, No. 71,333, slip op. (Tex. Crim. App. June 22, 1994), *cert denied*, 514 U.S. 1112 (1995). JA: 135. LaRoyce then sought habeas corpus relief in the state courts. His first application for state habeas relief was twice dismissed as untimely. *See Ex parte Smith*, 1998 Tex. Crim. App. WL

210613; *Ex parte Smith*, 977 S.W.2d 610 (Tex. Crim. App. 1998). The CCA subsequently authorized the filing of a second habeas application, which was filed in March 2000. On April 5, 2001, the state trial court recommended that the application be denied, and the CCA adopted that recommendation in *Ex parte Smith*, 132 S.W. 3d 407 (Tex. Crim. App. 2004). JA: 177. Although four judges of the CCA wrote separately to express their view that the application should have been denied on state procedural grounds, the majority declined to do so and decided the case on its federal constitutional merits. This Court summarily reversed the decision of the CCA. *Smith v. Texas*, 543 U.S. 37 (2004). JA: 225. On remand, the CCA again denied state habeas relief. *Ex parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006). JA: 269. It is that opinion that is now before this Court.

B. Facts Material to the Issues Presented

1. The Guilt Phase

This Court summarized the relevant facts of the crime as follows:

> In 1991, petitioner was convicted of brutally murdering one of his former co-workers at a Taco Bell in Dallas County. The victim and one of her co-workers were closing down the restaurant when petitioner and several friends asked to be let in to use the telephone. The two employees recognized petitioner and let him in. Petitioner then told his former co-workers to leave because he wanted to rob the restaurant. When they did not leave, petitioner killed one co-worker by pistol-whipping her and shooting her in the back. Petitioner also threatened, but did not harm, his other former co-worker before exiting with his friends. The jury found petitioner guilty of capital murder beyond a reasonable doubt.

543 U.S. at 38; JA: 225.

Critical mitigating evidence concerning Smith's mental deficiencies and difficult family background was introduced in the guilt phase of trial. Johnnie Mae Smith, LaRoyce

Smith's mother, testified that he was a slow learner in school and underwent a great deal of testing. JA: 52. He failed first grade and was in special education programs throughout elementary and middle school. *Id.* By the age of eighteen, LaRoyce had reached only the ninth grade, JA: 60, and he was still in the ninth grade when he turned nineteen. The crime was committed when LaRoyce was nineteen years old. JA: 53.

Johnnie Mae Smith and LaRoyce also testified about LaRoyce's father, Leroy Smith. Leroy Smith had been to prison for robbery. JA: 49-50. He was involved in a motorcycle gang, caroused with other women, and abused alcohol and drugs, especially crack cocaine. JA: 55. Leroy Smith repeatedly stole from his family to support his drug habit, JA: 56-57, which greatly disturbed all of the members of the family, including LaRoyce. JA: 58. At one point, when Leroy Smith sought to take a car from Johnnie Mae Smith and LaRoyce attempted to stop him, Leroy threatened LaRoyce with a butcher knife. JA: 61-62.

During his guilt-phase closing argument, defense counsel relied upon the evidence of LaRoyce's reduced mental capabilities to appeal to the jury's sense of comparative culpability, arguing that LaRoyce was less responsible than his co-defendant Kevin Shaw:

> You know, when you look at all the evidence and compare the two, they tell you LaRoyce is calling all the shots. Yeah, right. Let's look at it. Who's been to college? Remember Kevin? Kevin got kicked out of El Centro for having a gun, they said. LaRoyce has been in special ed since he started school. LaRoyce is the one who flunks first grade after he's been in Head Start since he was three years old. LaRoyce is 19 years old and he's in the ninth grade. Yeah, he's the brains.

JA: 66.

2. The Punishment Phase

The defense offered additional evidence of LaRoyce's cognitive impairments and difficult background in the penalty phase of the trial. Alberta Pingle, records coordinator for the special education department for the Dallas Independent School District ("DISD"), testified that LaRoyce had been identified at the earliest stages of his schooling as a slow learner with learning disabilities and speech handicaps. JA: 75-79. Testing performed by the school district indicated that LaRoyce's verbal IQ was 75 and full scale IQ was 78. JA: 85. A report prepared by Richard Adams, the director of health services for DISD, concluded on the basis of a physical exam and LaRoyce's school records that LaRoyce's learning problems were possibly organic in nature. JA: 81.

During Ms. Pingle's testimony, the defense introduced extensive school records that documented LaRoyce's academic and intellectual deficits from the time he entered school. A progress report issued less than two weeks before LaRoyce's seventh birthday reflects that he had not yet "learned all letters" and did not know his address or birthdate. JA II: 1. Despite his regular attendance, the report indicates "performance nil—progress nil." JA II: 1. At age ten, LaRoyce was reading somewhere between the first-and second-grade level, JA II: 18, and had a "3 year 6 month deficit as compared to chronological age in the area of receptive vocabulary skills." JA II: 27. Ms. Pingle, reading from the report documenting LaRoyce's academic progress at age ten, stated that "[h]e is slow and has difficulty remembering what he has learned." JA: 77. A school committee certified that LaRoyce's placement in special education was based on something other than deficiencies relating to "a different cultural lifestyle" or "not having had educational opportunities" or "not having achieved from [sic] previous educational experiences." JA II: 34. Ms. Pingle testified that school assessments documented LaRoyce's continuing need for special education at ages

eleven, twelve, and thirteen. JA: 78-85. One month before his fourteenth birthday, LaRoyce was still reading at the second-grade level. JA II: 58. Ms. Pingle also testified about LaRoyce's failing grades in eighth grade, JA: 86-87, and his failing grades in all three sections of the state's minimal skills test in ninth grade, JA: 88; JA II: 56, which caused LaRoyce to remain in the ninth grade through age nineteen.

Various family and community members confirmed the turbulence of LaRoyce's home life. Reverend Samuel Nicks, LaRoyce's pastor, testified that he was aware that LaRoyce's father had stolen from his family to support his drug habit, JA: 69, and that such behavior has an especially devastating impact on adolescent children. JA: 69. Dorothy Faye Ellis, a good friend of the family, testified that LaRoyce's family situation, especially the economic hardship wrought by his father's thefts, affected him greatly. JA: 104.

3. The Sentencing Instructions

The special issues on deliberateness and future dangerousness that were given to LaRoyce's jury were the same as those at issue in *Penry v Lynaugh*, 492 U.S. 302 (1989) *(Penry I)*:

> 1. Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result?
>
> 2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?[1]

Affirmative answers to both questions required imposition of the death sentence.

The jurors at LaRoyce's trial were also provided with a nullification instruction that they could disregard the content of the special issues if they believed that mitigating evidence

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[1] See Tex Code Crim Proc Art 37 071 (Vernon's ed 1989), which was the capital sentencing statute in effect at the time of LaRoyce's trial

—including evidence with "no relationship to any of the Special Issues"—led them to conclude "that the death penalty should not be imposed." *See* JA: 107.

Prior to trial, defense counsel filed three motions articulating the problems with the Texas sentencing scheme in the wake of *Penry I*. JA: 7-19. In the Motion to Reveal Mitigation Charge, counsel advised the Court that he would be offering evidence in mitigation "which has relevance beyond the parameters of the special issues." Counsel asked for guidance on what mitigation instructions the Court would be offering, so that he could proceed accordingly when exercising his peremptory strikes. JA: 18. In the two other motions, defense counsel objected to the special issue scheme on the grounds that it did not afford adequate consideration of LaRoyce's mitigating evidence, and that state law precluded supplementing the special issues with an unauthorized mitigation charge.[2] The trial court acknowledged LaRoyce's objec-

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[2] In the Motion to Declare Tex. Code Crim Proc. Ann. Art. 37.071 Unconstitutional, defense counsel argued:

> The Defendant further maintains that TEX CODE CRIM PROC ANN Art 37 071 is unconstitutional because it does not provide for the introduction and subsequent use by the jury of mitigating evidence which is not relevant or material to the special issues. There is no provision in Texas for the jury to decide the appropriateness of the death penalty taking into consideration the personal moral culpability of the Defendant balanced by mitigating evidence which is not directly or circumstantially probative in answering the special issues There is no provision in the current statutory scheme for the jury to render its verdict that the death penalty should not be inflicted because of mitigating evidence of this type.

JA: 13

In the Motion to Declare Tex Code Crim Proc. Ann Art. 37.071 Unconstitutional as Applied, defense counsel argued that the defect in the Texas special issue scheme could not be cured by the submission of an ad hoc supplemental instruction not authorized by the Texas Legislature JA: 9-10. In both of these motions, counsel repeatedly cited *Penry*

tions to the charge and denied both motions. JA: 21.[3]

4. Voir Dire

On voir dire, the prosecutors repeatedly asked prospective jurors, including jurors who ultimately served, whether they could answer the special issues honestly and without attempting to achieve a particular sentence—life or death. For example, during the voir dire of Teresa Lane, Juror No. 7, the prosecutor explained:

> [W]e're looking for a juror that's not leaning one way or the other, that they're going to look at these questions and answer them regardless of what that means. If the facts indicate any of these questions should be answered yes and that means he dies, well, that's just what the facts call for and that's the way you vote.

JA: 37. Similarly, in the voir dire of Lynn Bartholomew, Juror No. 10, the prosecutor asked: "[W]hat we have to have are jurors that will tell us despite . . . wanting a specific result, I will answer the questions based on the facts regardless of what the [sic] means, live or die. Do you think you can do that?" JA: 42.

At the same time, both defense counsel and the prosecutors also asked jurors about their willingness to follow the nullification charge. Of the twelve jurors who served, only two had an extended colloquy on voir dire about the meaning and operation of the nullification instruction. Each of these colloquies revealed either dismay or confusion on the part of the jurors involved.

The first exchange involved Gary Powell, the first juror seated. Mr. Powell, an attorney, expressed surprise and discomfort at the nullification instruction's invitation to answer

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[3] In addressing the Motion to Reveal Mitigation Charge, the trial judge asked counsel whether he wanted to word the mitigation charge differently. Trial counsel declined in light of his previously articulated position that the legislature must authorize departures from the statutory special issue language. JA 21

the special issues untruthfully, describing the prospect of nullifying as "a real tough choice" that ran contrary to his "legal sensibilities." JA: 25-26. Both defense counsel and the judge commiserated with Mr. Powell. The attorney acknowledged that the nullification instruction was "bizarre," and the judge expressed the "hop[e]" that the legislature would soon—as Mr. Powell put it—"add a fourth element . . . to catch those mitigating circumstances." JA: 26-27.

The second extended colloquy involved juror Dottie Wright, Juror No. 6. In the voir dire, the prosecutor explained to her that the jury would never directly address the question of whether the defendant should live or die:

> Okay. Let me tell you a little bit about how the trial works. You are not actually asked to give somebody life or death; what will happen is you'll be asked to answer a couple of questions. The way you answer those questions dictates whether or not he lives or dies. . . . You won't go back and decide, well,—you know, ask yourself, 'Should he live or die?' What you'd be doing is asking yourself to answer these questions.

JA: 30. Later in her voir dire, when asked if she could change one of her answers to the special issues "in order to give true effect and meaning to your heartfelt need," Ms. Wright at first emphatically stated that she would not do so: "No. If it's proven to me, my answer is going to stay strong . . . ." JA: 32. In response to further questions, Ms. Wright then indicated she would change her truthful answers to the special issues only if the defendant had proved his innocence. JA: 32. Still further questioning elicited yet another refusal to abandon truthful answers that resulted in a death sentence: "It's just like I say, if I've really been proven what it is, I feel it need [sic] to be a death sentence. . . ." JA: 33. Finally, after the nullification mechanism was explained yet again, Ms. Wright said she could "do it." JA: 34.

The voir dire exchanges regarding the nullification charge with the other jurors selected to serve were comparatively

slight. Either the prosecutor or defense counsel (or sometimes both) offered a definition of mitigating evidence, explained that if the jurors believed the defendant should be sentenced to life, they should go back and answer one of the special issues in the negative—even if they felt that the honest answer required an affirmative response—and asked if they would be comfortable doing so. In response, the selected jurors typically gave one word responses of "yes," "no," or "uh-huh" indicating their willingness to change their answers.[4]

5. Closing Arguments

During the punishment-phase closing arguments, the prosecutor emphasized the jurors' obligation to answer the special issues truthfully. Reminding them of voir dire, the prosecutor insisted on honesty:

> Now, when we talked to you on voir dire, we talked to you about—and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, 'Mr. Nancarrow, Ms. McDaniel, if you prove to me that the answers to those special issues should be yes, then I can answer them yes.' If you wavered, if you hesitated one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now.

JA: 111.

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[4] *See, e g* , SF 8 112-13, 133-34 (voir dire of Ava Meyer, Juror No 2), SF 10 118, 136-37 (voir dire of Donna Coulter, Juror No 3), SF 11 58-60 (voir dire of Carol Keyte, Juror No 4), SF 11 162-65 (voir dire of Thomas Morrison, Juror No 5); SF 15 31-32 (voir dire of Theresa Lane, Juror No 7), SF 16 18-19 (voir dire of Steven Dillow, Juror No 8), SF 16 70-71 (voir dire of Janis Zeigler, Juror No 9), JA 41 (voir dire of Lynn Bartholomew, Juror No 10), SF 21 53-54 (voir dire of Mary Foote, Juror No 11), SF 25 105-07 (voir dire of Derek Fisher, Juror No 12)

The prosecutor also emphasized that jurors had promised on voir dire that they could answer the dangerousness special issue affirmatively based on the criminal offense itself, JA: 114 ("You said you could answer that question number two yes just based on one act alone"). Thus, the prosecutor urged that the defendant's conduct during the crime "dictated" a "yes" answer to the second special issue. JA: 114.

Defense counsel responded by trying to rebut the State's evidence of deliberateness and dangerousness. JA: 117-118 (responding to State's case on deliberateness); JA: 118-119 (responding to State's case on dangerousness). The defense then separately emphasized the significance of the mitigating evidence it had presented. First, counsel reminded the jury of LaRoyce's placement in special education and his low intelligence, emphasizing his IQ of 78: "He is eight points from being mentally retarded." JA: 120. Defense counsel then stressed the effect of LaRoyce's "family problems," especially his father's crack habit and thefts from the family: "You know that has an impact on someone." JA: 121. Defense counsel urged the jurors to understand LaRoyce's mitigating evidence not as an attempt to shift blame to others, but rather as "something that happened and it's something that you should consider because it's not black and white." *Id*

6. The Verdict Form

The jury verdict form did not include any mention of mitigating evidence or of the jurors' ability to change their answers on the basis of such evidence, and asked only for answers to the two special issues. *See* JA: 123-124. The jury answered both issues affirmatively, and LaRoyce was sentenced to death.

SUMMARY OF THE ARGUMENT

This case comes to this Court for a second time. In its previous decision, this Court held that the sentencing instructions in LaRoyce's case did not provide a constitutionally adequate vehicle to consider LaRoyce's mitigating evidence, which included evidence of his 78 IQ score, his potentially organic learning disabilities and speech handicaps, and his troubled family background. 543 U.S. at 47-48; 234-236. This Court found error under *Penry I*, holding that the inquiries of the Texas special issue scheme "had little, if anything, to do with the mitigation evidence petitioner presented" 543 U.S. at 48, JA: 235. This Court likewise found error under *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), holding that the nullification instruction in this case, which permitted jurors to alter their truthful responses to the special issues to achieve a life sentence, was not a constitutionally adequate means of guaranteeing juror consideration of LaRoyce's mitigating evidence. 543 U.S. at 47; JA: 233. In reaching this conclusion, this Court specifically addressed and rejected the argument that the clarity of the nullification instruction in LaRoyce's case ensured that jurors would in fact give adequate consideration to LaRoyce's mitigating evidence, declaring that, "[t]o the contrary, the mandatory language in the charge could possibly have intensified the dilemma faced by ethical jurors." 543 U.S. at 47-48; JA: 235

On remand, the CCA deemed the constitutional error found by this Court harmless on the ground that jurors were in fact able to give adequate consideration to LaRoyce's "extensive mitigating evidence" via the special issues and the nullification instruction. 185 S.W.3d at 471-72; JA: 296-297 ("Applicant fails to provide any persuasive argument that the jury was unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take into account the specific evidence of his relatively low IQ test at the age of thirteen, his participation in a special education

reading program and speech therapy, or his troubled family background.").

In reaching this conclusion, the CCA relied on the very same arguments rejected by this Court when it found the special issues in combination with the nullification instruction inadequate in its summary reversal.

First, the CCA professed uncertainty about whether this Court found the special issues inadequate for the consideration of LaRoyce's mitigating evidence, despite this Court's forceful declaration that the inquiries of the deliberateness and dangerousness special issues, as in *Penry II*, "had little, if anything, to do with the mitigation evidence petitioner presented." 543 U.S. at 48; JA: 235. Second, and more fundamentally, the CCA insisted that the nullification instruction cured the *Penry I* problem because of the clarity of the instruction in the context of LaRoyce's trial, notwithstanding this Court's unequivocal holding that the "clearer instruction" did not resolve the *Penry II* problem and "could possibly have intensified" the jurors' ethical dilemma. *Id.* Third, the CCA rejected this Court's determination that "the nullification instruction may have been more confusing for the jury to implement in practice than the state court assumed." *Id.* at n.5. In concluding that jurors would have implemented the nullification instruction without problem or confusion, the CCA ignored this Court's specific conclusions that the prosecutor's closing arguments exacerbated the moral dilemma posed by the nullification instruction and that the bare verdict form—which made no mention of mitigation evidence—undermined the likelihood that jurors would have viewed themselves free to ignore the plain language of the special issues. Moreover, the purportedly new consideration that led the CCA to conclude that jurors would have followed the nullification directive—that "neither the jurors who served, nor the parties or trial judge noted a potential dilemma," 185 S.W.3d at 468; JA: 291—is contrary to the record in this case,

in which a seated juror, the trial judge, and defense counsel all recognized, discussed, and lamented the precise ethical dilemma highlighted by this Court.

The CCA's harmless error ruling is nothing more than a disagreement with this Court's federal constitutional conclusion that the special issues in combination with the nullification instruction did not provide an adequate means for jurors to give effect to LaRoyce's mitigating evidence. Consequently, this case is not about the meaning of *Penry I*, the meaning of *Penry II*, or the appropriate scope of state harmless error law. This case is about whether a state court's decision to revisit this Court's constitutional judgment and to reject specific conclusions in this Court's opinion can be squared with this Court's remand to the state court "for further proceedings not inconsistent with this opinion." The fact that the state court's harm analysis wholly depended on a rejection of this Court's merits analysis requires reversal of the decision below.

In addition, a separate basis for reversal can be found in the state court's insistence that petitioner show "egregious harm" on remand as a predicate for relief. The CCA's decision to require "egregious harm" violates federal law in numerous respects.

First, the CCA's basis for requiring such harm—LaRoyce's purported failure to make an adequate contemporaneous objection to the charge at trial—was adopted by the CCA only in response to this Court's review and reversal of the CCA's erroneous decision of LaRoyce's federal constitutional claim on the merits. Although four judges on the CCA had claimed that LaRoyce's objection to the instruction was inadequate in their first decision, the majority of the CCA refused to embrace such a finding and addressed LaRoyce's claim on the merits. The CCA's decision to revisit the adequacy of LaRoyce's contemporaneous objection on remand punishes his success in this Court and improperly attempts to manipulate this Court's appellate jurisdiction.

Second, trial counsel plainly and clearly objected to the failure of the special issues to allow constitutionally adequate consideration of LaRoyce's mitigation. The CCA's finding of insufficient objection is premised on a misunderstanding of the applicable federal right. Moreover, if Texas law precludes consideration of LaRoyce's claim in these circumstances, such a hyper-technical preservation requirement for claims of constitutional error independently violates federal law.

The CCA acknowledged that LaRoyce "may have suffered 'some' actual harm" and therefore would be entitled to relief absent the application of its "egregious harm" standard. Accordingly, because the CCA's application of the egregious harm standard itself violates federal law, the CCA decision cannot stand for reasons independent of the CCA's unacceptable rejection of the merits of this Court's initial decision in this case.

The most appropriate course for this Court is to recognize that its prior decision together with the CCA's own findings mandate relief for LaRoyce's federal constitutional claim. The CCA's opinion recognized and acknowledged that LaRoyce's mitigating evidence was "extensive." 185 S.W.3d at 471; JA: 296. This Court's own opinion stated that "[t]here is no question that a jury might well have considered petitioner's IQ scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death." 543 U.S. at 44; JA: 231-232. If the CCA had implemented this Court's holding that the sentencing scheme precluded constitutionally adequate consideration of LaRoyce's mitigating evidence, it would have been compelled to find the constitutional violation harmful. Moreover, if the CCA had not switched its position regarding the adequacy of LaRoyce's objections to the special issue scheme, it would have granted relief in light of its acknowledgement that LaRoyce suffered at least "some harm." Even without this acknowledgement, it is indisputable that a properly instructed jury might well have concluded that a nineteen-year-old

ninth-grader with a 78 IQ, a long history of special education, and a troubled family background, should be spared the death penalty. This Court should accordingly remand with instructions to grant relief on LaRoyce's *Penry* claim.

ARGUMENT

I. THE STATE COURT'S HARMLESS ERROR ANALYSIS REJECTED THE MERITS OF THIS COURT'S SUMMARY REVERSAL AND THEREFORE VIOLATED THIS COURT'S MANDATE.

The crux of the state court's opinion in this case is that jurors would have believed themselves empowered to falsify their truthful responses to the special issues and thus that LaRoyce failed to show "that the jury was unable to consider the totality of his extensive mitigating evidence." 185 S.W.3d at 471; JA: 296. In support of its conclusion, the CCA emphasized the purported clarity of the explanations of the nullification instruction on voir dire, the purported absence of prosecutorial argument limiting jurors' consideration of mitigating evidence, and the sheer weight and effective presentation of LaRoyce's mitigating evidence.

This approach contradicts the holding of this Court in its summary reversal that the nullification instruction did not provide an effective means for jurors to give effect to LaRoyce's mitigating evidence. It also contradicts two explicit components of this Court's analysis. First, this Court unequivocally rejected the state court conclusion, repeated in the decision below, that the problem of requiring jurors to lie to give effect to mitigating evidence is solved by clearly informing them of their power to do so. Second, this Court, citing various aspects of LaRoyce's trial—including prosecutorial argument and the content of the verdict form—likewise rejected the CCA's conclusion that the nullification instruction would not, on the facts of this case, have confused jurors as they decided whether and how to give effect to mitigating evidence.

The CCA decision, by reasserting the very points this Court previously rejected and ignoring this Court's legal conclusions, has violated the Court's mandate. Moreover, the CCA's claim that the *Penry* error in this case was cured by the nullification instruction in part *because of* the power and extent of LaRoyce's mitigating evidence gets it exactly backwards. Given this Court's firm holding that jurors lacked an adequate vehicle to consider LaRoyce's mitigating evidence, the CCA's acknowledgement of the extensive, compelling character of LaRoyce's mitigating evidence *confirms* rather than undermines the conclusion that the constitutional error in this case cannot be deemed harmless.

A. Each Part of the CCA's Harmless Error Analysis Repudiates or Ignores Specific Conclusions Reached by this Court in its Summary Reversal.

1. The CCA's reliance on the purportedly clear explanation of the nullification instruction on voir dire cannot be squared with this Court's decision. Moreover, the record in this case confirms this Court's concerns about the inefficacy of the nullification instruction.

In its prior decision denying habeas relief in this case, the CCA held that *Penry II* did not control the outcome because the jurors here would have clearly understood their power to answer the special issues untruthfully in order to give effect to mitigating evidence. 132 S.W.3d at 416; JA: 190 ("The 'nullification' instruction in this case was a sufficient vehicle to accord full weight to applicant's mitigation evidence."). One of the two concurring opinions particularly emphasized that "during voir dire, [the nullification] instruction and how it operated was very carefully explained to each venire-member who sat on defendant's jury" and that "these venire-members stated that they understood it." *Id.* at 420; JA: 199. (Hervey, J., joined by Keasler, J., concurring). The concurring opinion offered extensive quotations from the voir dire to

support its view that jurors actually understood the operation of the nullification instruction and indicated their willingness to follow it. *Id.* at 420-23; JA: 199-204.

This Court nonetheless rejected the view that a clearly crafted and communicated nullification instruction would permit constitutionally adequate consideration of mitigating evidence In this Court's view, although the nullification instruction in this case was "clearer" than the one in *Penry II* in commanding jurors to belie their honest answers to the special issues if mitigating evidence persuaded them to do so, "the clearer instruction given to petitioner's jury did not resolve the ethical problem" posed by nullification instructions. 543 U.S. at 47; JA: 235. From this Court's perspective, the core problem of nullification instructions is that they depend on jurors' willingness to violate their oaths to ensure consideration of mitigating evidence. Hence, telling jurors to do so clearly and emphatically is not a solution

Now, on remand, the CCA pointed to the same excerpts from voir dire in an attempt to demonstrate what it previously argued—that jurors understood the nullification command and hence were able to give meaningful effect to LaRoyce's mitigating evidence. According to the CCA

> During voir dire, both the State and applicant questioned almost all potential jurors regarding their ability to consider mitigating evidence. Both sides explained the process of allowing jurors to change one of the special issue answer [sic] from a 'yes' to a 'no' if they found mitigating evidence sufficient to warrant a life sentence rather than the death penalty Overwhelmingly, the jurors agreed that they could change a 'yes' answer to 'no' if instructed by the judge to do so upon finding sufficient mitigating evidence.

185 S.W.3d at 468; JA: 290.

The CCA's conclusion that meticulous explanation of the nullification instruction on voir dire ensured constitutionally adequate consideration of LaRoyce's mitigating evidence is

directly contrary to this Court's explicit conclusion on this point. The bottom line of this Court's summary reversal was that the CCA could not distinguish *Penry II* by finding the nullification command in this case particularly clear. In fact, this Court insisted that the clarity and forcefulness of a nullification command might well "intensif[y] the dilemma faced by ethical jurors." 543 U.S. at 47-48; JA: 235. The CCA's reassertion on remand that jurors could give effect to LaRoyce's mitigating evidence because they understood their power to answer the special issues untruthfully amounts to a blatant disregard of this Court's decision.[5]

In addition, the CCA appears to justify its disregard of this Court's summary reversal by suggesting that the trial record in this case did not support this Court's concerns that jurors would be uncomfortable lying to achieve a desirable result. According to the CCA:

> The Supreme Court specifically noted that the nullification instruction 'intensified the dilemma faced by ethical jurors' in this case. That is indeed a possibility, although neither the jurors who served, nor the parties or trial judge noted such a potential dilemma or expressed such a concern, either during voir dire or later.

185 S.W.3d at 468; JA 290-291.

In fact, this Court's concerns about the ethical dilemma posed by nullification instructions are amply vindicated by the trial court record. The very first juror to be seated, Gary Powell, had the most extended colloquy regarding the nullification instruction. Mr. Powell expressed surprise and dis-

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[5] The same sort of argument about the adequacy of voir dire to inform jurors of their power to falsify their answers to the special issues was made by the State in *Penry II* itself. *See* Respondent's Brief in *Penry*, JA 322-323 ("In each case, the supplemental instruction was exhibited and explained to the venire member, and any confusion arising from a venire member's initial exposure to the instruction was addressed until resolved.")

comfort when he was told on voir that he would be required to lie in order to give effect to mitigating evidence:

> Q . . . Now, some people tell us, can't do it. Other people tell us they could do it, that they could, in effect, misanswer one of the questions in order to arrive at the desired result.
>
> A Well, that [sic] a real tough choice. So the law, as you understand the way the verdict or the form would be submitted, there wouldn't be a fourth choice, any other mitigating circumstances? You have to take these three, work with these three, and regardless of how you might feel about these three, if you feel the other mitigating evidence indicated at that time was inappropriate, pick one of those three, any one, and answer no, just so you get the result that you think is correct?
>
> Q. As bizarre as that sounds, that's exactly right.
>
> A. Well, if that's the instruction from the Court, I could follow the instruction from the Court. Frankly, my legal sensibilities would be more comfortable if they just put a fourth element in there and just ask if there are any other mitigating circumstances that you find make it inappropriate, but if that's what the law requires –

JA: 25-26.

The trial judge then sought to explain that the nullification instruction was a response to this Court's decision in *Penry*. JA: 26-27. Mr. Powell, though he acknowledged he understood the circumstances leading to use of the nullification charge, continued to express qualms about its use:

> Q. [the Court] . . . Does that make a little bit more sense why it's done that way?
>
> A. Yeah, historically, now I understand why it's done that way. It just does seem illogical where you take an oath to answer all the questions correctly, and then you subvert that by—and the court says, "Well, in this one instance, we'll let you answer otherwise than what you feel is absolutely the truth in order to give effect to this other."

Well, maybe in the next session they will add a fourth element and just let you—to catch those mitigating circumstances.

Q. We're all hoping.

JA: 27.[6]

The voir dire of the other members of LaRoyce's jury was slight in comparison. In all cases, the prosecutor or defense counsel (or both) recited a lengthy account of the meaning of mitigating evidence and described jurors' ability to nullify their answers, and the juror would in one or two words affirm his or her understanding of the entire account, including his or her willingness to change his or her answers.[7] This sort of voir dire should not bolster confidence that jurors in fact felt free to answer the special issues untruthfully. Indeed, the relatively slight voir dire on the nullification instruction following the experience with Mr. Powell, the first seated juror, likely reflects the reluctance of the trial participants (prosecution, defense, and trial judge) to open a can of worms by highlighting what Mr. Powell's voir dire had confirmed: careful and extensive reflection on the meaning of the nullification instruction sharpened the conflict between that

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[6] Juror Wright's voir dire revealed similar levels of confusion and discomfort. It took several rounds of explanations and questions about the operation of the nullification mechanism to finally elicit from Juror Wright that she could "do it." *See supra* at 8, JA. 34 Ms Wright's hard-wrung concession, viewed in light of her prior answers, lends little confidence to the assertion that she or the other jurors in fact understood the nullification instruction

[7] *See, e g*, SF VIII 112-13, 133-34; (voir dire of Ava Meyer, Juror No 2), SF X 118, 136-37, (voir dire of Donna Coulter, Juror No 3), SF XI 58-60; (voir dire of Carol Keyte, Juror No 4), SF XI 162-65 (voir dire of Thomas Morrison, Juror No 5), SF XV 31-32 (voir dire of Theresa Lane, Juror No 7); SF XVI:18-19 (voir dire of Steven Dillow, Juror No 8), SF XVI 70-71 (voir dire of Janis Zeigler, Juror No. 9); SF XX·187-89, 204-06 (voir dire of Lynn Bartholomew, Juror No 10); SF XXI.53-54 (voir dire of Mary Foote, Juror No 11), SF XXV.105-07 (voir dire of Derek Fisher, Juror No 12)

instruction and the jurors' oath. Indeed, the voir dire of another juror, Lynn Bartholomew, who also served on LaRoyce's jury, reflects defense counsel's effort to downplay the ethical quandary of following the nullification instruction's command:

> Q . . . Like the prosecutor was telling you, the court will indicate that if you believe through what's called mitigating evidence—that's really anything. It's stuff that you could hear in the guilt-innocence phase; it's stuff that you could hear in the punishment phase; it's the whole totality of circumstances—if you felt that he shouldn't die, then you're authorized—actually the court says you shall, which is legal mumbo-jumbo for must, change one of the answers from 'yes' to 'no' if you feel that he should not die. Do you have any problem with that?
>
> A. No.
>
> Q. Okay. I mean, it's not like you're cheating or lying or doing something—
>
> A. No.

JA: 46-47.

Defense counsel's effort to assure this juror that following the nullification instruction would not amount to "cheating" or "lying," like the extended colloquy with Mr. Powell, contradicts the CCA's assertion that no one at trial recognized the ethical problem this Court highlighted in *Smith*.

Thus, the CCA's assertion that none of the participants in this case—"neither the jurors who served, nor the parties or trial judge"—expressed any concerns about the ethical dilemma posed by the nullification instruction is inaccurate. At the very outset of voir dire, the trial judge, defense counsel, and a seated juror voiced precisely those concerns. The seated juror recognized that the nullification instruction "subvert[ed]" his oath of honesty, defense counsel characterized the nullification mechanism as "bizarre," and the trial judge expressed "hop[e]" that the nullification device would be ren-

dered obsolete by the addition of a new special issue directly addressing the significance of mitigating factors. In such circumstances, the CCA's suggestion that the "ethical dilemma" described by this Court was a fanciful "possibility" belied by the facts on the ground simply cannot be credited.

2. The CCA relied upon a finding that the prosecutor did not contribute to the dilemma posed by the nullification instruction. That finding flouts a contrary finding made by this Court and is belied by the record.

In its summary reversal of the CCA's prior decision, this Court concluded that the prosecutor had sought to counter the effects of the nullification instruction by reminding jurors of their promises to "'follow the law' and return a 'Yes' answer to the special issues so long as the State met its burden of proof." 543 U.S. at 48 n.5; JA: 235. Such an admonition to the jury was similar to the prosecutor's exhortation to the jury in *Penry II* to "follow your oath, the evidence, and the law," *id.* (quoting *Penry II*), because it "reminded the jurors that they had to answer the special issues *dis*honestly" in order to give effect to mitigating evidence. *Id* Accordingly, this Court concluded that the prosecutor's comments in this case further supported its conclusion that the special issues in combination with the nullification instruction did not afford an adequate vehicle for the consideration of LaRoyce's mitigating evidence.

Notwithstanding this Court's specific conclusions, on remand the CCA reached the opposite conclusion, insisting that the prosecutor's closing arguments enhanced rather than undermined the likelihood that jurors could give effect to LaRoyce's mitigating evidence. 185 S.W.3d at 471; JA: 295 ("Significantly, the prosecutor never suggested that the jury should ignore or fail to consider any of applicant's mitigation evidence" in answering the special issues). In the CCA's view, the absence of prosecutorial argument telling jurors to

ignore LaRoyce's mitigation evidence supported its conclusion that petitioner failed to establish "that the jury was unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take into account the specific evidence of his relatively low IQ test at the age of thirteen, his participation in a special education reading program and speech therapy, or his troubled family background." 185 S.W.3d. at 471-72; JA 296-297.

This argument, like the CCA's reliance on the clarity of the voir dire, rejects this Court's explicit conclusions that the nullification instruction, in the context of LaRoyce's trial, was constitutionally inadequate and that "the nullification instruction may have been more confusing for the jury to implement in practice than the state court assumed." 543 U.S. at 48, n.5; JA: 235 More fundamentally, the argument depends on the CCA's tenacious belief that an unambiguous nullification command can serve as a constitutionally adequate means of facilitating consideration of mitigating evidence. Some members of the CCA have gone so far as to repudiate explicitly their duty to follow this Court's decision in *Penry II*. *See, e.g*, 185 S.W.3d at 474; JA 301-302 (Hervey, J., joined by Keasler, J., concurring) ("we are not bound by the view expressed in *Penry II* that Texas jurors are incapable of remembering, understanding and giving effect to the straight-forward and manageable 'nullification' instruction such as the one on this case"); *Ex parte Smith*, 132 S.W.3d at 427; JA: 212 (Hervey, J., joined by Keasler J., concurring) ("we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case") (using "but see" citation reference to *Penry II*). Given this Court's unequivocal rejection of the CCA's position that a "clear" nullification instruction solves the *Penry II* problem, the CCA's claim that the prosecutor did not undermine the

purported clarity of the nullification instruction is plainly irrelevant.

Moreover, in asserting that the prosecutor did not aggravate the nullification problem, the CCA fails to mention much less discuss or credit this Court's conclusion to the contrary. When this Court makes an assessment of the constitutional significance of particular facts, it is not an option for the state court to ignore or revisit that assessment on remand. *See, e.g*, *Dean v. Hickman*, 358 U.S. 57 (1958) (*per curiam*) (granting motion for leave to file a petition for mandamus based on state court's assertion of power, after remand by this Court, "to adjudicate, upon its own independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States" a determination made by this Court).

Finally, the CCA's claim about the nature and effect of the prosecutor's argument is also belied by the record. In addition to the admonitions quoted in this Court's prior opinion, 543 U.S. at 48, n.5; JA: 235 (reminding jurors that they had promised to "'follow the law' and return a 'Yes' answer to the special issues so long as the State met its burden of proof"), other prosecutorial comments on voir dire and during the punishment phase closing argument likewise reflect an effort to restrict the scope of the special issues inquiry. During voir dire, the prosecutors repeatedly and at great length insisted that jurors commit themselves to answering the special issues honestly based only on the facts and not with an eye to imposing a particular sentence: "If the facts indicate any of these questions should be answered yes and that means he dies, well, that's just what the facts call for and that's they way you vote." JA: 37 (prosecutor's voir dire of Teresa Lane, Juror No. 7). *See also* JA: 42 (prosecutor's voir dire of Lynn Bartholomew, Juror No. 10); JA: 30 (prosecutor's voir dire of Dottie Wright, Juror No. 6). During closing argument, the prosecutor reinforced this message by asking the jurors to recall their responses to these admonitions during voir dire: "You told us . . . if you prove to me that the answers to

those special issues should be yes, then I can answer them yes." JA: 111. The prosecutor also reminded the jurors that they had promised they could return an affirmative answer to the dangerousness special issue based solely on the crime itself, JA: 114 ("You said you could answer the question number two yes just based on one act alone.").

Given these sorts of prosecutorial arguments, which discouraged jurors from viewing the special issues as a broad vehicle to assess the appropriate punishment, this Court was undoubtedly correct to conclude that the purportedly "clear" nullification instruction "may have been more confusing for the jury to implement in practice than the state court assumed." 543 U.S. at 48 n.5; JA: 235. In any case, the CCA could not ignore this conclusion on remand and reargue that the nullification mechanism actually ensured adequate consideration of LaRoyce's mitigating evidence.

3. The CCA's insistence that the scope and power of LaRoyce's mitigating evidence ameliorated the constitutional violation in this case cannot be squared with this Court's conclusion that the special issues in combination with the nullification instruction did not provide an adequate vehicle for the consideration of LaRoyce's evidence. In fact, the CCA's acknowledgement of the extent and force of LaRoyce's evidence compels the conclusion that the error identified by this Court cannot be deemed harmless.

In the last prong of its analysis supporting its ultimate conclusion that LaRoyce could not show sufficient harm to warrant relief, the CCA highlighted the strength of LaRoyce's mitigating evidence and the powerful presentation of such evidence during closing argument:

> All of his mitigating evidence was admitted, defense counsel did a superb job of weaving all of that evidence

> into a compelling theory of the case, and his attorneys presented a strong, coherent, and persuasive closing argument on punishment. We therefore conclude that applicant has failed to show, by a preponderance of the evidence, that the unobjected-to-jury nullification instruction caused him "egregious harm."

185 S.W.3d at 472; JA: 298.

On its face, this sort of argument is counter-intuitive. If the constitutional error identified by this Court involved extensive and persuasively-argued mitigating evidence, the likelihood of harm is overwhelming. The CCA's position, though, is that the power and extensiveness of LaRoyce's mitigating evidence undermined this Court's conclusion that jurors would have been unable to give effect to such evidence. *Id.*, 185 S.W.3d at 471; JA: 296 (petitioner did not establish sufficient harm because he had failed to establish that jurors were "unable to consider the totality of his extensive mitigating evidence"). The CCA's claim in this regard appears to be twofold. First, the CCA seems to suggest that abundance of mitigating evidence likely contributed to jurors' perceptions that they could nullify their answers to the special issue in response to such evidence. Second, the CCA appears to argue that much of LaRoyce's evidence could have been addressed without recourse to the nullification instruction because defense counsel argued that LaRoyce was remorseful and capable of rehabilitation. Neither of these conclusions is tenable, and both are inconsistent with this Court's holding.

The fact that defense counsel introduced extensive mitigating evidence, including evidence of LaRoyce's low intelligence, placement in special education from an early age, and troubled family background, did not solve or ameliorate the constitutional defect in the sentencing instructions in this case. While it is true that defense counsel reminded jurors of their duty to falsify their truthful answers, 185 S.W.3d at 470; JA: 293 ("if you think that he should not die, you are to put

'no' in one of the spaces"), and gave them ample reason to reject the death penalty based on LaRoyce's very low intelligence and troubled background, the force of his argument only intensified the dilemma faced by ethical jurors. Jurors who were persuaded that LaRoyce did not deserve to die were required to answer the special issues untruthfully, and the fact that defense counsel gave them a strong incentive for lying did not ensure that they would have felt less troubled about doing so. In short, the CCA's claim that the extensiveness of LaRoyce's mitigating evidence made it less likely that the error was harmful is simply another reiteration of its argument that a clear nullification instruction would have ensured adequate consideration of relevant mitigating evidence.[8] Such a conclusion is implausible and, given this Court's explicit holding to the contrary, unavailable.

The CCA also seems to suggest that LaRoyce's mitigating evidence, including his evidence of low intelligence, long-term placement in special education, and his troubled background, could have been given significant effect within the special issues, especially in light of how such evidence was argued at punishment. This argument, too, is foreclosed by this Court's opinion, which found that "the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." 543 U.S. at 48; JA. 235. Although the CCA asserts that this Court "did not address our conclusion 'that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence,'" 185 S.W.3d at 463;

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[8] The fact of the well-presented argument "is beside the point because in the absence of a vehicle—a proper mitigation question—the jury had no way to express its reasoned moral response to the *argument* in mitigation, and the *evidence* in mitigation." *Ex parte Smith*, 185 S.W.3d at 480 (Holcomb, J., dissenting) (emphasis in original).

JA: 281,[9] the Court's declaration that the inquiries of the special issues "had little, if anything, to do with" LaRoyce's mitigation evidence unambiguously finds those issues inadequate to permit consideration of such evidence.

In addition, this Court's decision in *Smith* came on the heels of its decision in *Tennard v. Dretke*, 542 U.S. 274, (2004), which declared that the relationship between the special issues and the defendant's evidence of his low IQ had "the same essential features as the [relationship between the special] issues and Penry's mental retardation evidence." The Court explained that "[i]mpaired intellectual functioning has mitigating dimension beyond the impact it has on the individual's ability to act deliberately," and that "the jury might have given [the defendant's] low IQ evidence aggravating effect in considering [his] future dangerousness." *Id.* In such circumstances, it is quite understandable that this Court's summary reversal did not explain at length why LaRoyce's evidence of low intelligence and placement in special education must be treated similarly, for *Penry* purposes, to Penry's evidence of mental retardation and Tennard's evidence of low IQ. Contrary to the Respondent's position, the Court's decision not to belabor this point does not undermine in the least the binding quality of this Court's pronouncement in this case that the special issues "had little, if anything, to do with the mitigation

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[9] The CCA later appears to concede the possibility that this Court's remand was premised on a finding of *Penry* error: "Nonetheless, because we are uncertain as to the Supreme Court's current *Penry II* jurisprudence, we will assume, for the sake of argument, that at least some of applicant's evidence was not fully encompassed by the two special issues Thus, we shall assume the jury charge in this case was constitutionally deficient under *Penry II*" 185 S.W 3d at 466-67 Despite its lip-service to the finding of *Penry* error in this case, the CCA's harm analysis is premised entirely on its continued insistence that the special issues and the nullification instruction enabled constitutionally adequate consideration of petitioner's mitigating evidence—a clear rejection of conclusions that were essential to this Court's finding of *Penry* error

evidence petitioner presented." See Respondent's Brief in Opposition to Certiorari at 12 ("This remark suggests the statutory issues may be insufficient if an analysis were made, but the remark is not supported by any *Penry I* analysis or a cite to case law.").

Moreover, the presentation of LaRoyce's mitigating evidence during the punishment phase reveals that his counsel never argued that LaRoyce's intellectual deficits, placement in special education, or troubled background somehow justified a negative answer to the deliberateness or dangerousness special issues. Defense counsel did actively challenge the State's evidence with respect to both inquiries. He began by stating "[t]here's two special issues" and "I want to talk about both of them." JA: 117. He first argued that the jury could reject deliberateness by looking at the autopsy report and evidence of the actual blows inflicted on the victim, JA: 118, plainly viewing deliberateness as a narrow inquiry focused on the defendant's actions at the time of the crime. Defense counsel also sought to counter the state's evidence of dangerousness, arguing that LaRoyce's lack of a serious prior criminal record supported a negative answer to the second special issue. JA: 119 In this regard, defense counsel attempted to minimize the significance of LaRoyce's prior interaction with the criminal justice system and his behavior problems in school, SF 33:47-49, emphasized that LaRoyce did not brag about the killing, SF 33:53, and reminded jurors that LaRoyce had behaved well during his pre-trial incarceration. SF 33:54. Later in the argument, defense counsel likewise sought to disprove dangerousness by pointing to the numerous character witnesses who testified to their positive interactions with LaRoyce. SF 33:61-66.

When defense counsel turned to LaRoyce's evidence of his low IQ, his special education in school, and his troubled background, though, he shifted gears ("I want to talk to you about mitigating evidence") and never attempted to suggest

that this evidence supported a negative answer to the special issues. Rather he urged that the evidence is "something that you should consider:"

> I want to talk to you about mitigating evidence. First of all, about special education. Now, from 1978, there's evidence—now, it's not like he had been plotting and planning since 1978 that maybe one day he'll do something and that it will be good to have this stuff. That's the way he is. The evidence we have, medical diagnosis, slow learner, may be organic. Objective test data, IQ 78. He is eight points from being mentally retarded. . . .
>
> Look at the record, then, in '86, still having problems, mark through promote. You all heard of social promotion. It's probably a football promotion, too. Family problems. Lucas will say "Well, we've all had problems and many of us have been raised by single parents." That's true, but how many of us have had our daddies sell our appliances for crack, that we've had to take and hide our V.C.R.'s, our T.V.'s, our freezers, so our own daddy wouldn't go and sell it for crack? You know that that has an impact on someone. It has an impact on how they act in school. Now, Lucas will say, "Well, you blame school, you blame the parents. We're doing the best we can." We're not blaming the school, and we're not blaming the parents. We're telling you that it's something that happened and it's something that you should consider because it's not black and white.

JA: 120-121.

Thus, while the CCA is undoubtedly accurate in asserting that defense counsel offered extensive evidence in support of a "primary theme" that LaRoyce "was a young man whose life was worth saving," 185 S.W.3d at 470; JA at 297, many of those arguments for saving LaRoyce's life had nothing to do with the deliberateness and dangerousness special issues. There is literally nothing in defense counsel's closing argument that increased the likelihood that jurors would have regarded his low intelligence, placement in special education,

and troubled background as reasons, independent of the nullification instruction, to arrive at a "no" answer to the deliberateness or dangerousness questions. The fact that defense counsel offered evidence and argument *apart* from his low intelligence, special education background, and troubled background to attempt to persuade jurors to say no to deliberateness and dangerousness in no way suggests that jurors would have likely regarded *all* of his evidence as bearing on those inquiries. Indeed, the presence of the nullification instruction—with its invitation to consider evidence with "no relationship to any of the Special Issues," *see* JA: 107—made it much less likely that jurors would have believed that all of LaRoyce's mitigating evidence was relevant to the deliberateness or dangerousness inquiries.

Accordingly, the trial record documenting LaRoyce's mitigating evidence and its presentation during closing argument confirms what this Court has already concluded: that the special issues, alone or in combination with the nullification instruction, were an inadequate vehicle for considering LaRoyce's mitigating evidence

B. The CCA's Methodology of Assessing Harm by Reassessing Whether, in the Context of LaRoyce's Trial, Jurors Were in Fact Precluded from Giving Effect to LaRoyce's Mitigating Evidence, Fails to Recognize that this Court's Finding of Constitutional Error in this Case Already Entailed Precisely the Same Inquiry.

The common thread of the CCA's arguments above is that the particulars of LaRoyce's trial, including the voir dire, prosecutorial argument, and defense presentation of the evidence, ensured that jurors were able to give meaningful consideration to LaRoyce's mitigating evidence and thus precluded a finding of significant harm. The CCA regarded the summary reversal in this case as only highlighting the "possibility" that jurors would have found themselves precluded

from giving effect to such evidence, 185 S.W.3d at 468; JA: 291, and it viewed the remand as an occasion for determining whether in fact jurors were so precluded.

This tactic misunderstands this Court's approach to claims that sentencing instructions unconstitutionally constrain consideration of mitigating evidence. The Court has consistently held that such claims require an examination of the instruction "in light of all that has taken place in the trial" to determine whether there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant mitigating evidence." *Boyde v. California*, 494 U.S. 370, 371 (1990). *See also Ayers v. Belmontes*, 2006 WL 3257143 (U.S.), slip op. at *5 (citing *Boyde*).

Accordingly, this Court engaged in precisely this inquiry in its summary reversal in this case. It found *Penry I* error because the nature of LaRoyce's evidence—including his low IQ, his placement in special education, and his troubled background—could not be given adequate consideration. It found, in accord with *Penry II*, that this defect was not overcome by the addition of a supplemental nullification instruction that invited jurors to answer the special issues falsely to give effect to mitigating evidence. 543 U.S. at 47; JA: 233. It addressed and rejected the CCA's contention that the particular circumstances of LaRoyce's trial ensured that jurors could follow the nullification instruction, both because this Court questioned the CCA's assumption that the nullification message was not diluted by aspects of LaRoyce's trial, and because even a crystal clear command "could possibly have intensified the dilemma faced by ethical jurors." *Id.* at 48; JA: 235. In assessing the effect of the nullification command, this Court emphasized that the verdict form given to the jurors "made no mention whatsoever of mitigation evidence" and that jurors might not have remembered an oral directive to answer the special issues falsely when the written questions before them said nothing of the sort. *Id.* 48. This

Court also viewed the prosecutor's closing arguments, which reminded jurors that they had promised to "follow the law" and to answer the special issues affirmatively "so long as the State met its burden of proof," as undercutting the nullification message. *Id.* at 48 n.5; JA: 235. Hence, the Court's determination of constitutional error in this case entailed its finding that the particulars of LaRoyce's trial did not ensure adequate consideration of the mitigating evidence.

Accordingly, the CCA was wrong not to accept as a *premise* of its harm analysis that LaRoyce's mitigating evidence was outside the effective reach of the jury. By selectively canvassing the record and ignoring this Court's assessment of the factors relevant to the inquiry, the CCA managed to *conclude* precisely what this Court rejected—that, given the instructions in the context of trial, LaRoyce had failed to establish "that the jury was unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take into account the specific evidence of his relatively low IQ test at the age of thirteen, his participation in a special education reading program and speech therapy, or his troubled family background." 185 S.W.3d at 471-72; JA: 296-297.

Because the CCA's harm analysis rested entirely on its rejection of particular conclusions that were essential to this Court's determination of *Penry* error, the CCA's conclusion that the *Penry* error in this case was harmless cannot stand.

C. The *Penry* Error in this Case Was Harmful Under Any Standard, Including the "Egregious Harm" Standard Imposed by the CCA.

If the CCA had accepted rather than rejected this Court's conclusive determination that constitutional error occurred during the sentencing phase of this case, it would not and could not have deemed that error harmless under any standard. The CCA itself acknowledged the "extensive" nature of LaRoyce's

mitigating evidence and the "strong" arguments made by defense counsel to the jury on the basis of that evidence. 185 S.W. 3d 471-72; JA: 296-298.[10] But the CCA plainly disregarded this Court's determination that the special issues and the nullification instruction failed to provide the jury with a vehicle to give mitigating effect to the extensive evidence of LaRoyce's cognitive impairment, learning problems, and troubled family background. Had the CCA followed this Court's mandate, it would have been forced to acknowledge that LaRoyce's mitigating evidence—without an appropriate vehicle to give it mitigating effect—could have only enhanced jurors' concerns about LaRoyce's future dangerousness instead of serving as a "a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). When extensive evidence of the kind that "might well have influenced the jury's appraisal of [the accused's] moral culpability," *Williams v. Taylor*, 529 U.S. 362, 398 (2000), is not only precluded from consideration as mitigating *but also is admitted as aggravating*, a finding of "harm" is unavoidable.

A finding of harm is equally compelled under the "egregious harm" standard applied by the CCA.[11] The CCA explains that the inquiry into "egregious harm" is essentially an inquiry into the "fundamental[]" fairness of the proceed-

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[10] The CCA referred to the evidence as "extensive" and noted the defense's "dramatic account of [LaRoyce's] humanity" and "superb job of weaving all of that evidence into a compelling theory of the case" during its "strong, coherent, and persuasive closing argument on punishment." 185 S.W 3d at 471-72; JA. 296-298.

[11] Petitioner in no way concedes the constitutionality of the CCA's imposition of its "egregious harm" standard as a result of its reconsideration on remand of the adequacy of petitioner's preservation of his constitutional claim, *see infra* pages 39-50 However, determining the correct harmless error standard is not necessary to the resolution of this case because it is manifest that petitioner suffered harm from his constitutionally defective sentencing proceeding under any standard, including the "egregious harm" standard

ing. 185 S.W.3d at 472; JA: 298. Whatever else "fundamental fairness" might be thought to require, a capital sentencing proceeding cannot be deemed "fundamentally fair" if extensive evidence that might well have saved the life of the accused was allowed consideration only to the extent that it made his execution *more*, rather than less, likely.

Recognition of the magnitude of the harm in this case does not require the conclusion that any and all *Penry* errors are *per se* harmful.[12] The relevant inquiry is whether the nature and extent of LaRoyce's evidence could have persuaded jurors to embrace a life sentence, and whether the same evidence could also have had substantial aggravating significance. So, for example, if LaRoyce's sole evidence had been that he had average intelligence but had failed a class in third grade, a court might justifiably conclude that such evidence, though outside the jury's effective reach, was so insubstantial in its mitigating force and so unlikely to add significantly to the case for future dangerousness that it would not likely have affected the jury's ultimate judgment. Here, however, by any measure and by the CCA's own account, LaRoyce's mitigating evidence was quite substantial. Moreover, that evidence undoubtedly had the same "two-edged" relevance to the question of future dangerousness as did the evidence offered in *Penry* itself. *Penry I*, 492 U S at 324 Under such circumstances, a finding of harm is inescapable, however the standard is framed.

Apart from the CCA's own characterization, the mitigating evidence was indeed substantial by any measure, both in its

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[12] Petitioner argued below and has preserved before this Court the position that *Penry II* might constitute structural error because it affects the overall manner in which evidence is received or considered *See* Petition for Writ of Certiorari at 21, n 14 However, because it is evident that petitioner suffered harm under any standard, this Court need not resolve whether *Penry II* error falls within the class of claims exempt from harm analysis *Arizona v Fulminante*, 499 U S 279 (1991).

quantity and in its mitigating power. First, consider the sheer quantity of mitigating evidence offered on behalf of LaRoyce. Numerous witnesses and exhibits during both the guilt phase and the punishment phase established LaRoyce's cognitive impairment, low aptitude and low achievement.[13] This detailed account of LaRoyce's intellectual limitations was a key element of the defense's mitigation theory and accounted for the bulk of defense penalty phase exhibits admitted into evidence and submitted to the jury.

Second, LaRoyce's mitigating evidence was not only "extensive" in scope and detail, it was of a kind that this Court has repeatedly recognized as especially powerful. As defense counsel argued to the jury, referencing LaRoyce's IQ score of 78: "He is eight points from being mentally retarded." JA: 120. This Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that defendants who have mental retardation are categorically exempt from capital punishment under the Eighth Amendment, recognized the myriad ways in which severe cognitive deficiencies "diminish [defendants'] personal culpability," *id.* at 318:

> Because of their impairments . . . they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . [T]here is abundant evidence that they often act on im-

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[13] *See* JA 85 (testimony); JA II: 58 (exhibit) (full scale IQ as low as 78); JA II: 25 (learning problems possibly organic in nature); JA II 10 (progress report stating "[h]e is slow and has difficulty remembering what he has learned"), JA II: 27 (indicating at age ten, receptive vocabulary skills of a 6 1/2-year-old), JA II: 58, (reading at second-grade level one month shy of fourteenth birthday), JA 120 (reaching ninth grade by age nineteen only because of "social" or "football" promotion, despite having failed all eighth-grade courses)

> pulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Id

LaRoyce's extensive evidence of limited cognitive and adaptive skills throughout his childhood, coupled with his low IQ, places him very close to complete exclusion from death eligibility; there can be no question that evidence of this type is particularly potent evidence of reduced culpability. Furthermore, the detailed evidence of LaRoyce's unstable and troubled home life reinforced and deepened the defense portrait of his reduced moral culpability. *See supra* at pp 3, 5.

In numerous cases, this Court has recognized the likelihood that evidence of these two types would sway at least one juror to change the verdict from death to life. In *Penry I* itself, this Court explained:

> Because Penry was mentally retarded . . . and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, [a rational juror could conclude that] Penry was less morally culpable than defendants who have no such excuse.

492 U.S. at 322 (internal citations omitted). *See also Wiggins v Smith*, 539 U.S. 510, 512 (2003) (evidence of childhood abuse established a "reasonable probability that at least one juror would have struck a different balance"); *Williams*, 529 U.S. at 398 (2000) (evidence that defendant was borderline mentally retarded, coupled with evidence of childhood abuse, "might well have influenced the jury's appraisal of his moral culpability.").

Unlike the defendants in *Wiggins* and *Williams*, whose double-edged evidence was never presented to the jury, LaRoyce was not merely denied the powerful mitigating effect of his evidence of reduced culpability; he was also harmed by the *aggravating* effect of that evidence in relation to the special issue regarding future dangerousness. As this Court recognized in *Penry I*, evidence of cognitive impair-

ment and troubled childhood is a distinctively "two-edged sword" in that "it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." 492 U.S. at 324.

The jurors could reasonably have concluded that LaRoyce's substantial cognitive impairments rendered him less able to learn from his mistakes, to avoid dangerous situations, to control his impulses, or to resist negative peer influences (which he would undoubtedly encounter in a prison setting). Moreover, it is obvious that the jurors might reasonably have concluded that LaRoyce's repeated exposure throughout his childhood to drug use, theft, robbery, and violence would make him more likely to engage in such behavior as an adult than one who had a relatively stable childhood with positive role models.

Only by flouting this Court's mandate and holding that the sentencing jury *was* able to give mitigating effect to LaRoyce's extensive mitigating evidence could the CCA deny that LaRoyce was harmed by the *Penry* error in his case. Indeed, the CCA's recognition of the "strong" presentation by the defense of its mitigating case *enhances* rather than detracts from the harmfulness of the error. If a case is close on the question of life or death, mitigating evidence that is precluded from consideration becomes that much *more* important. LaRoyce's youth, his lack of a serious prior criminal record, and the many character witnesses who testified on his behalf all confirm the CCA's observation that defense counsel mounted a "well-crafted," though unsuccessful, argument that his life was "worth saving." 185 S.W.3d at 472; JA: 297. If the jury had been afforded a constitutionally adequate vehicle to consider the mitigating effect of LaRoyce's evidence of cognitive impairment, learning problems, and troubled family background, such a close case may well have turned the other way. Under these circumstances, a finding of harm under any standard—perhaps especially under a standard that purports to look at "fundamental fairness"—is compelled.

This case involves no substantive issues of death penalty law. Those issues—whether the strictures of *Penry I* and *Penry II* were violated in this case—were decided by this Court's summary reversal. Nor does this case present a genuine question about whether the *Penry* error in this case was harmful. The answer to that question is compelled by the CCA's own acknowledgement of the extensiveness of the mitigating evidence offered in this case and precluded from consideration as a result of the *Penry* error found by this Court, leaving only the potentially aggravating import of the evidence for the jury's consideration. Rather, this case concerns this Court's authority "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and to have its final judgments be "conclusive upon the parties." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 355 (1816) The CCA's harmless error analysis on remand was fundamentally dependant upon the CCA's rejection of this Court's legal conclusions and thus constitutes a violation of this Court's mandate. There is simply no way to parse the CCA's opinion so as to render it "not inconsistent" with this Court's opinion. This Court's role as the final arbiter of federal law entails the power and responsibility to protect the integrity of its mandates. The CCA's decision must be reversed.

II. AS THE CCA'S IMPOSITION OF AN "EGREGIOUS HARM" REQUIREMENT VIOLATES FEDERAL LAW, THE CCA'S ACKNOWLEDGEMENT THAT LAROYCE "MAY HAVE SUFFERED 'SOME' ACTUAL HARM" COMPELS RELIEF.

The CCA's requirement that LaRoyce demonstrate "egregious harm" as a predicate for relief, based on his purported failure to make an appropriate contemporaneous objection to the sentencing instructions in this case, independently violates federal law and constitutes a separate basis for reversing the CCA decision. The imposition of the egregious harm standard

violates federal law in three respects, any one of which is a constitutionally sufficient basis for rejecting the CCA's recourse to that standard. First, the CCA's refusal to deem LaRoyce's objection inadequate in its decision prior to the remand precludes revisiting that issue on remand. Permitting state courts to resurrect procedural obstacles after this Court grants relief on the merits would empower state courts to manipulate this Court's appellate jurisdiction and render many of this Court's opinions "advisory" in violation of the case or controversy requirements of Article III. Second, LaRoyce's objections to the failings of the special issue scheme and the nullification instruction clearly satisfied state law, and the CCA's contrary conclusion depends on a misunderstanding of the applicable federal right. Lastly, if LaRoyce's efforts to preserve his federal constitutional rights were insufficient under state law, the state law impediments to the vindication of such rights excessively burden the enforcement of federal law.

The CCA, in stating that LaRoyce "may have suffered 'some' actual harm" from the failure of the sentencing scheme to give adequate effect to his mitigating evidence, has already acknowledged that LaRoyce must receive relief absent the unjustified imposition of its egregious harm standard. Accordingly, even if the CCA's harmless error analysis were not defective for its repudiation of the merits of this Court's decision, its inappropriate requirement of "egregious harm" independently calls for reversal of the CCA decision.

A. The CCA Already Considered and Rejected the View that LaRoyce Failed to Preserve His *Penry* Claim at Trial. The CCA's Effort to Revisit that Determination Following this Court's Reversal on the Merits Threatens Two Core Aspects of this Court's Appellate Jurisdiction.

In its original consideration of this case, prior to this Court's reversal, four CCA judges in two different concurring

opinions asserted that LaRoyce had failed to preserve his claim that the special issues and nullification instruction precluded adequate consideration of his mitigating evidence. *See* 132 S.W.2d at 423; JA: 205 (Hervey, J., joined by Keasler, J., concurring); *Id* at 428; JA: 214 (Holcomb, J., joined by Price, J., concurring). The asserted basis for default was LaRoyce's purported failure to make an appropriate trial objection to the instructions. Despite these arguments, the majority refused to impose a state procedural default and decided the case on its federal constitutional merits. In its summary reversal, this Court specifically noted the CCA's refusal, over the objection of four judges, to impose a procedural bar in its decision. 543 U.S. at 43 n.3; JA: 230.

On remand, the CCA concluded that LaRoyce had to show that the constitutional violation identified by this Court caused "egregious harm" rather than "some harm" under *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984). The CCA acknowledged that defense counsel had filed two pretrial motions challenging the failure of the special issues to allow adequate consideration of his mitigating evidence and had asserted that state law did not permit the trial court to modify the statutorily-authorized special verdict form via the nullification instruction. 185 S.W.3d at 461 n.8; JA: 278. Nonetheless, the CCA concluded that application of the "egregious harm" standard was warranted because LaRoyce did not make a specific objection to the jury nullification instruction during the punishment-charge conference. *Id.* at 461; JA: 288. Thus, the CCA applied the egregious harm standard post-remand based on precisely the same facts on which it refused, pre-remand, to impose a procedural default.

1. The CCA may not undercut this Court's merits decision by revisiting its refusal to impose a procedural bar in this case.

This Court exercises its appellate jurisdiction over state court decisions sparingly and only in circumstances where the

federal issue controls the outcome of the litigation. The reasons for such restraint are both prudential and constitutional. This Court's resources are best expended on cases where the application of federal norms is essential, and the "case" or "controversy" requirement of Article III commands that this Court's pronouncements regarding federal law occur only when such interpretations are an indispensable aspect of adjudicating the rights of actual litigants. As this Court declared in *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945), when it declined to apply federal law in a circumstance where it was uncertain whether a state law basis for decision might ultimately control the outcome of the litigation:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Id. at 126-27 (internal citations omitted).

For that reason, this Court carefully reviews petitions for review arising from the state courts to assess whether the judgment from the state court might rest on a state ground for decision. *See id.* at 128 ("It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law. Nor will we review one until the fact that it does not do so appears of record.").

When this Court first agreed to review this case, it had no reason to believe that LaRoyce's claim was procedurally compromised by his failure to make an appropriate objection. Indeed, this Court thought it worthy of mention that the majority of the CCA refused to credit the concurring judges' view of procedural irregularity—the same purported procedural irregularity on which the CCA now relies. In such circumstances, the CCA's decision to address LaRoyce's federal rights was a clear signal to this Court that the outcome of the case depended on the application of federal law rather than the enforcement of state procedural rules. If state courts were free to revisit procedural determinations after this Court's review, this Court would regularly be frustrated in its scrupulous efforts to avoid advisory pronouncements.

Moreover, the CCA's choice to revisit its declination of a state ground of decision amounts to an unacceptable manipulation of its procedural rules to defeat this Court's adjudication of LaRoyce's *Penry* claim. This Court has consistently rejected efforts of state courts to evade the consequences of this Court's applications of federal law via belated assertions of state grounds for decision. *See, e g , Ford v Georgia*, 498 U.S. 411, 421-25 (1991) (rejecting application of newly-announced state procedural requirement on remand); *Yates v. Aiken*, 484 U.S. 211, 214-15 (1988) (rejecting State's argument that the state court, on remand from this Court's decision finding federal constitutional error, could craft state nonretroactivity rule to deny relief because mandate contemplated application of federal not state law). This principle is especially compelling when, as here, the purported state law basis for decision was recognized and available as a basis for decision prior to this Court's intervention on the merits. *See, e g., NAACP v. Alabama ex rel Patterson*, 360 U.S. 240, 244-45 (1959) (rejecting State's effort on remand to evade consequences of this Court's decision by recasting its analysis of petitioner's compliance with state law and stating that "the

State is bound by its previously taken position" regarding the extent of petitioner's noncompliance).

Thus, the CCA's decision on remand to punish LaRoyce for his purported failure to make an adequate objection at trial, on the heels of its unwillingness to deem the objection inadequate before this Court's reversal on the merits, amounts to an impermissible "bait and switch," threatening two core aspects of this Court's appellate jurisdiction. The belated assertion of the procedural obstacle undermines this Court's constitutionally-based commitment to resolving issues of federal law in cases where federal principles dictate the outcome of the litigation, thereby avoiding advisory opinions. Moreover, left uncorrected, the bait and switch in this case threatens this Court's enforcement of federal constitutional norms because the CCA's decision is nothing less than an opportunistic invocation of state law to avoid compliance with this Court's decision.

2. The CCA's refusal, prior to remand, to default LaRoyce's *Penry* claim cannot be reconciled with its post-remand imposition of the egregious harm standard on the theory suggested by respondent: that *Penry* claims are not defaultable as a matter of state law.

Respondent argues that the CCA's initial decision in this case—refusing to find LaRoyce's *Penry* claim defaulted based on the purported lack of a contemporaneous objection—should not be construed as rejecting the procedural basis for the default. According to respondent, the best explanation for the CCA's refusal to default LaRoyce's claim is that "Texas law simply did not permit it," because constitutional claims regarding jury charge error are not defaultable in state habeas proceedings. BIO at 28.

Respondent's argument is untenable for several reasons. First, the CCA's own opinions in this case lend no support for the theory. The four judges who concurred in the initial

decision clearly regarded *Penry* claims as defaultable. Three of those judges joined the current opinion,[14] and their votes were necessary to support the 7-1 judgment. Second, in other cases the CCA has consistently treated *Penry* claims as defaultable. *See, e g , Black v State*, 816 S.W 2d 350, 360 (Tex Crim. App. 1991) (Campbell, J., concurring) (recognizing that *Penry* claims are defaultable but refusing to impose default because such claims fell within a "right-not-recognized" exception to default doctrine). Indeed, the CCA has imposed defaults based on the absence of contemporaneous objection in several prior cases, including cases involving alleged *Penry* error. *See, e g., Nichols v Scott*, 69 F.3d 1255, 1266 (5th Cir. 1995) (upholding CCA's procedural default of applicant's *Penry* claim regarding his non-triggerman status based on applicant's "failure to object to the punishment charge"); *accord Turner v Johnson*, 1997 U.S App. LEXIS 12669 (1997) (finding no basis for overcoming CCA default of jury instruction claim for lack of a timely objection). The absence of *any* state decisions denying or undercutting the applicability of procedural default to jury instruction claims on state habeas is reflected in a recent federal district court decision: "Petitioner alleges no facts and cites this Court to no Texas case law showing the Texas courts have inconsistently applied the contemporaneous objection rule in similar contexts, i.e., with regard to alleged constitutional errors in a jury

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[14] Judge Holcomb, who concurred in the denial of relief prior to this Court's intervention, dissented from the denial of relief on remand He rejected the majority's imposition of its egregious harm standard, concluding that a close examination of the record did not support his initial view that petitioner's trial objections were inadequate under state law 185 S W 3d at 474, JA at 303 ("Although I was once persuaded to believe otherwise, Smith's federal constitutional claim that he was denied an effective vehicle by which a jury could consider and give effect to his mitigating evidence was not procedurally defaulted ") He did not question the assumption of his earlier opinion that *Penry* claims are defaultable in the absence of a valid contemporaneous objection

charge." *Martinez v. Dretke*, 426 F.Supp.2d 403, 527 (W.D. Tex. 2006).

In light of this authority, there is simply no basis for respondent's claim that Texas law does not authorize the application of its procedural default rules to jury instruction claims on state habeas.[15] Moreover, respondent's assertion of such a position is undercut by its own insistence, after the Court's remand in this case, that the CCA impose a procedural default to LaRoyce's claim based on the lack of a contemporaneous objection at trial. State's Brief on Remand at 7; JA at 246 ("Applicant has procedurally defaulted this claim under Texas law because he did not raise any objection to the charge at trial or on appeal."). Having just argued to the CCA that it should impose the procedural default, and thereby insulate the CCA's opinion from further review in this Court, State's Brief on Remand at 8; JA at 246-247 ("The Supreme Court will not review a decision by a state's highest court if it rests on a state law ground independent and adequate to support the result."), the State cannot now insist that "Texas law simply d[oes] not permit" default under such circumstances.

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[15] In its supplement brief in opposition to certiorari, respondent attempts to distinguish cases in which the CCA or the federal courts have upheld procedural defaults Supp. BIO at 9-14 ("III Charge error is not generally forfeitable in Texas") But respondent fails to offer any affirmative support for its contention that such claims are not defaultable on state habeas The sole case it offers along these lines, *Ex parte Baldree*, 810 S W 2d 213, 214-15 n 2 (Tex. Crim. App 1991), confirms precisely the opposite. The CCA declined to impose a procedural default in *Baldree* on the basis of its decision in *Black v State*, 816 S W 2d 350 (Tex. Crim. App 1991), which held that the right-not-recognized doctrine excused the procedural default of Black's *Penry* claim But the CCA in *Black* plainly viewed *Penry* error as defaultable 816 S.W 2d at 364 (excusing default because of the "settled state of the case law at the time of appellant's trial"); *see also* 816 S W.2d at 367 (Campbell, J , concurring) ("In this concurrence, I present a more expansive view as to possible exceptions to the rules of procedural default under Texas law ")

Accordingly, the CCA pre-remand refusal to default LaRoyce's *Penry* claim cannot be squared with its post-remand conclusion that the lack of a contemporaneous objection requires imposition of the egregious harm standard. At a minimum, the CCA's post-remand reliance on the absence of a contemporaneous objection reflects a discretionary or inconsistent application of state procedural rules, and such capricious application of rules cannot burden the enforcement of federal rights. *See, e g , Williams v. Georgia*, 349 U.S. 375, 383 (1955) (discretionary application of state rule to bar consideration of a federal claim is not independent and adequate state ground).[16]

B. LaRoyce Adequately Preserved his *Penry* Claim Under State Law, and the CCA's Contrary Conclusion Rests on a Misapplication of Federal Law.

The CCA's belated assertion that LaRoyce failed to preserve his *Penry* claim cannot be squared with the record in this case

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[16] The CCA's imposition of its *Almanza* "egregious harm" standard on remand is capricious in a second, unrelated way The CCA originally envisioned *Almanza* to provide the standard for the consideration of unobjected-to error on *direct* review—a state analog to the federal "plain error" rule The application of the rule in habeas proceedings has been rare and erratic, with no examples prior to the instant case since the late 1980's *See Ex parte Tuan Truong*, 770 S W 2d 810 (Tex Crim. App 1989) (most recent application) Moreover, the *Almanza* standard was originally and repeatedly held to apply only to *non*-constitutional errors, and its expansion to constitutional error is likewise recent, rare, and unpredicatable *See, e g , Ladd v Texas*, 3 S W 3d 547, 564 (Tex Crim App 1999) ("Appellant's failure to object was not excused by Article 36 19 and *Almanza v Texas* because they are applicable only to violations 'which do not implicate state or federal constitutional rights '") Moreover, LaRoyce's case is the first time that the *Almanza* "egregious harm" standard has ever been applied to a *Penry* claim on state habeas *Penry* claims have long been held to be defaulted on state habeas if not properly preserved, although the CCA has overlooked the default where the claim was unavailable or futile The arbitrary and discretionary application of the *Almanza* standard separately renders the CCA's requirement of "egregious harm" an inadequate state bar to relief for LaRoyce's federal constitutional claim.

and in fact rests on a misunderstanding of federal law. From the outset of this litigation, LaRoyce has claimed that the special issues did not permit adequate consideration of his mitigating evidence. LaRoyce filed two pretrial motions to this effect. *See* JA: 7-16. LaRoyce also took the position, well-established in state law at the time of trial,[17] that the trial court lacked power to solve the *Penry* defect by altering or supplementing the legislatively-prescribed special issues. When the trial judge presented the proposed charge to the parties, he acknowledged LaRoyce's pretrial objections and made clear that he regarded them as fully before the court:

> THE COURT: The two motions to declare Texas Code of Criminal Procedure Annotated, Article 37.071, Section 3701 unconstitutional as applied, I read those and sort of read them and put them in my mind together. Is there anything not included in those motions that your wish to supplement orally?
>
> MR. MANASCO: No, Your Honor.

JA: 21.

In light of LaRoyce's written motions and the Court's oral acknowledgement of his claim under *Penry*, LaRoyce plainly preserved his claim that the special issues failed to allow adequate consideration of his mitigating evidence. The CCA nonetheless found LaRoyce's objections inadequate because he "did not object to the jury nullification instruction." 185 S.W.3d at 461; JA: 278.

The CCA's decision misunderstands the relationship between *Penry I* and *Penry II*. The crux of LaRoyce's *Penry I* claim is that his mitigating evidence could not be given mitigating effect via the special issues and, indeed, might have provided support for affirmative answers to those

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[17] *See, e.g., Stewart v. State*, 686 S.W.2d 118, 124 (Tex. Crim. App. 1984) (rejecting additional instruction in capital case because trial courts lack authority to submit special issues other than those set forth by the legislature in the death penalty statute)

inquiries. Having clearly, repeatedly, and forcefully stated that claim in a timely fashion, LaRoyce need not also have anticipated the State's (and subsequently the CCA's) flawed contention that the nullification instruction ameliorated the *Penry I* error. In short, the nullification instruction in this case did not *cause* constitutional error, it simply did not *cure* it. Thus, this Court's holding that LaRoyce's sentencing proceeding was constitutionally inadequate because the "burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented," 543 U.S. at 48, JA: 235, is responsive to precisely the constitutional defect LaRoyce identified from the outset of the trial. Accordingly, the CCA may not impose a state barrier to relief based on his purported failure to alert the trial court to the basis of his constitutional claim.

Moreover, if state law were to require more in these circumstances, where the trial court plainly understood and acknowledged the defendant's assertion that the state scheme precluded adequate consideration of his mitigation evidence, such requirements would themselves constitute impermissible barriers to the enforcement of federal law. This Court has not hesitated to reject state procedural bars to relief for federal constitutional violations when state procedural rules are inappropriately or needlessly demanding. *See, e.g., NAACP v Alabama ex rel Flowers*, 377 U S. 288, 297 (1964) (rejecting state procedural rules applied with "pointless severity"); *Staub v. City of Baxley*, 355 U S. 313 (1958) (rejecting state court finding of default based on defendant's inadequately detailed objections because to do so "would be to force resort to an arid ritual of meaningless form").

Accordingly, federal law precludes the CCA's imposition of its "egregious harm standard" based on the purported inadequacy of LaRoyce's timely objections at trial. The CCA's acknowledgement that LaRoyce "may have suffered

'some' actual harm," 185 S.W.3d at 472; JA: 298, thus compels relief for the constitutional violation identified by this Court.

CONCLUSION

The CCA's decision withholding relief in this case rests wholly upon reasoning that contradicts and is foreclosed by this Court's explicit conclusions in its summary reversal. Moreover, the CCA's refusal to grant relief depends critically on its post-remand finding of procedural irregularity that it had previously declined to embrace. Stripped of these two impermissible maneuvers, the CCA's own analysis compels the conclusion that the constitutional error found by this Court was harmful to LaRoyce Smith. This Court should therefore reverse the judgment and order the CCA to grant petitioner relief on his constitutional claim.

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No. 05-11304

In The
Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

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QUESTIONS PRESENTED

1. In *Smith v. Texas*, 543 U.S. 37 (2004), the Court held that, under its decisions in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), there was constitutional error in the jury charge used in Smith's capital trial and remanded the case to the Texas Court of Criminal Appeals for further proceedings not inconsistent with its opinion. In this state postconviction proceeding, was it consistent with the Court's remand for the Texas Court of Criminal Appeals to apply Texas's established harmless-error analysis to determine whether the constitutional defect in Smith's jury charge was harmful?

2. In this state postconviction proceeding, does the Texas Court of Criminal Appeals's application of Texas's established harmless-error standard constitute an adequate and independent state ground of decision?

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STATEMENT OF THE CASE

Late Monday evening, January 7, 1991, 19-year-old Jennifer Soto was closing up shop as the shift manager at a Taco Bell in Dallas County. She and fellow employee Travis Brown had locked the restaurant and commenced cleaning and filling out paperwork. Around 11:30 pm, Petitioner LaRoyce Lathair Smith knocked on the door, along with several of his friends, asking to use the telephone. Brown wisely refused to let them in, but Jennifer recognized Smith as a former employee and greeted him with a hug. J.A. 135-36.

While Jennifer returned to the back office, Smith lingered, telling Brown that they planned to rob the Taco Bell, J.A. 136, and saying, "[i]f you keep your mouth shut, you'll get a cut of the money," J.A. 271. When Smith walked back to Jennifer's office, Brown testified, he soon heard yelling and found Smith "pistol-whipping" Jennifer on the head with the butt of a gun, continuing the beating until the gun's handle fell off. J.A. 136, 138. Smith wanted the combination to the safe, but Jennifer did not know it and screamed, "Call Tina, call Tina." J.A. 271-72. Brown saw Smith step back and shoot Jennifer in the back at point-blank range. J.A. 136; 27.RR.68-70.[1] Jennifer cried out, "God, please don't let me die." J.A. 272.

Smith then grabbed a knife from the kitchen and proceeded to stab Jennifer four times underneath her left breast, and then again in her thigh, abdomen, and head. J.A. 136; 27.RR.70-78. At trial, the multiple punctures underneath Jennifer's breast were described as "torture" wounds. 27.RR.77. Finally, Smith sliced the knife across Jennifer's neck, severing her jugular vein and killing her. 27.RR.71-73. Smith then just walked out, telling Brown before he left that he would kill him if he talked to the police. J.A. 272.

Smith was tried and convicted of capital murder. In the punishment phase, Smith called twenty witnesses, all but three of whom testified in part about what they

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[1] "RR" refers to the reporter's record, preceded by the volume number and followed by the page numbers.

described as his generally good character and behavior.[2] Eleven defense witnesses testified nearly exclusively on Smith's perceived positive character traits or conduct,[3] and three more testified primarily concerning the same.[4] One witness testified concerning Smith's diagnosis at an early age of possibly organic learning disabilities, relatively low IQ, and educational background involving special education classes.[5] And four witnesses indicated their awareness that Smith's father had had drug problems, and that his father's bad behavior had affected Smith.[6]

Smith's counsel's closing argument spanned forty pages of trial transcript, thirty-nine of which concerned: (1) trial evidence that counsel urged suggested Kevin Shaw, not Smith, was the ringleader in Jennifer's murder, *see* 33.RR.38-43; (2) discussion of the meaning of "deliberate" in special issue one and argument that although Smith premeditated robbery, he did not premeditate Jennifer's murder, *see* 33.RR.43-45; (3) argument that the evidence showed Smith was not a continuing threat to society, including an exhaustive review of the testimony of Smith's many character witnesses, *see* 33.RR.45-65; (4) general discussion about whether society has progressed to a point where there is an alternative to the death penalty, *see* 33.RR.33-37; and (5)

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[2] Alberta Pingle (custodian of records for the Dallas ISD's special education department) and Charles Linch (an analyst who conducted the test of the handwashings of those with Smith the night of the murder) did not know Smith. The other, Smith's brother Myron Wilson, spoke of the family background. *See infra* fn.6.

[3] *See* 32.RR.50-54 (Jim Stambaugh); 32.RR.54-62 (Fred Cox); 32.RR.62-74 (Kristi Goffney); 32.RR.75-81 (Meg Goffney); 32.RR.82-88 (Robbie Johnson); 32.RR.95-101 (Charlotte Thompson); 32.RR.101-06 (Tracy Reed); 32.RR.106-09 (James Miles); 32.RR.114-21 (Gertha Williams); 32.RR.122-24 (Benny Williams); 32.RR.124-25 (Johnnie Mae Smith).

[4] *See* 32.RR.2-14 (Samuel Nicks); 32.RR.91-94 (Dorothy Faye Ellis); 32.RR.109-14 (LaTonya Kerlin).

[5] *See* 32.RR.14-50 (Alberta Pingle).

[6] *See* 32.RR.10-11 (Samuel Nicks); 32.RR.89-91 (Myron Wilson); 32.RR.92-93 (Dorothy Faye Ellis); 32.RR.113 (LaTonya Kerlin).

discussion concerning the State's burden and the role of the jurors, *see* 33.RR.69-70.

Defense counsel also presented brief argument concerning the potential mitigating effect of Smith's IQ, special education, and neglectful father, which together comprised a single page of the forty-page argument. *See* 33.RR.57-58.

As provided by Texas law at the time, the jury was instructed to answer two special issues during the punishment phase: (1) whether they had determined that Jennifer's murder was "deliberate," and (2) whether Smith posed a continuing danger to others. *Smith v. Texas*, 543 U.S. 37, 39 (2004); J.A. 225-26.[7] Because Smith's trial took place during the two-year period between the Court's decision in *Penry I* and the Texas Legislature's enactment of a new statutory special issue in response to *Penry I*, the trial judge also gave the jury a supplemental so-called "nullification" instruction.[8] *See* J.A. 106-07.

Smith presented motions to the trial court arguing that under Texas law the court could not submit any supplemental instructions to the jury regarding consideration of his mitigating evidence, and that therefore the entire Texas sentencing scheme was unconstitutional as applied to him. *See* J.A. 7-16. Both motions were denied. J.A. 21. The trial court then invited Smith's counsel to suggest modifications or alternative language for the proposed nullification instruction, *see* J.A. 21, but counsel declined to do so.

The jury, after hearing all of the evidence—including all of Smith's proffered mitigating evidence as well as the graphic evidence of his crime, the evidence of his prior history of violent behavior and possession of drugs,[9] and the evidence of

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[7] *See also* Act of May 28, 1973, 63d Leg., R.S., ch. 426, art. 3, §1, 1973 Tex.Gen.Laws 1122, 1125-26 (codified at TEX. CODE CRIM. PROC. art. 37.071).

[8] *Smith*'s 1991 trial occurred ten years before the Court disapproved of nullification instructions in *Penry II*. *See Penry II*, 532 U.S., at 798-99.

[9] This evidence included Smith's vicious physical attack on a young man with a baseball bat one year prior to Jennifer's murder. Smith assaulted Chris Standmier with a baseball bat, striking him first in the ribs and then

(Continued on following page)

his prior conviction for misdemeanor assault—sentenced Smith to death.

The Texas Court of Criminal Appeals affirmed Smith's conviction on direct appeal, *Smith v. State*, No. 71,333, slip op. at 10-11 (Tex. Crim. App. June 22, 1994) (not designated for publication); J.A. 135-55, and this Court denied *certiorari*, *Smith v. Texas*, 514 U.S. 1112 (1995). Smith then filed a state habeas corpus petition, which was dismissed as untimely. *Ex parte Smith*, 977 S.W.2d 610 (Tex. Crim. App. 1998). Subsequently, the Court of Criminal Appeals considered Smith's second state habeas petition under newly-enacted procedures for untimely habeas applications. *See Smith*, 543 U.S., at 42-43. In the interim, Smith had filed a petition for postconviction relief in the United States District Court for the Northern District of Texas, but this proceeding was ultimately dismissed without prejudice so that Smith could pursue his state postconviction proceeding. *Smith v. Johnson*, No. 3:98-CV-1778 (N.D. Tex. 1999); TEX. CODE CRIM. PROC. art. 11.071, § 4A.

In his second state habeas petition, Smith alleged for the first time that the trial court's nullification instruction itself, as opposed to Texas's entire capital sentencing statute as applied to him, was unconstitutional under *Penry II*. *Ex parte Smith*, 132 S.W.3d 407, 410 (Tex. Crim. App. 2004) ("*Smith I*"), *rev'd on other grounds sub nom. Smith v. Texas*, 543 U.S. 37 (2004) ("*Smith II*"); J.A. 180-181. In *Smith I*, the Court of Criminal Appeals denied habeas relief. J.A. 177-193. The court held that Smith's mitigating evidence was constitutionally irrelevant, did not extend beyond the two statutory special issues (making the nullification instruction unnecessary), and, in any event, that the trial court's nullification instruction cured any error and was materially different from the instruction disapproved-of by the Court in *Penry II*. *Smith I*, at 408-417; J.A. 177-193.

This Court summarily reversed, *Smith II*, 543 U.S., at 48; J.A. 236, concluding that the Court of Criminal Appeals

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swinging so hard that he broke the bat across Standmier's head. Smith then pulled out a Tech-9 machine gun, pointed it at Standmier's midsection, and said, "Nigger, get back from me, I'll kill you." 31.RR.24-25, 30-33.

had applied an unconstitutional screening test for weighing the relevance of Smith's mitigating evidence, *id.*, at 43-44; J.A. 230-232, and that the nullification instruction in Smith's case was insignificantly distinct from the instruction in *Penry II*, and therefore unconstitutional, *id.*, at 44, 48; J.A. 231, 236. The Court remanded the case to the Court of Criminal Appeals for further proceedings "not inconsistent with this opinion." *Id.*, at 48.

On remand, the Court of Criminal Appeals recognized that this Court had held that Smith's jury charge was "constitutionally deficient under *Penry II*," and so it turned to consider the appropriate remedy for that constitutional error. *Ex parte Smith*, 185 S.W.3d 455, 467 (Tex. Crim. App. 2006) ("*Smith III*"); J.A. 288. Under longstanding Texas law, however, constitutionally deficient jury charges do not necessarily result in the automatic reversal of sentences. Rather, the typical state-court practice, where jury-charge error is found, is to assess first whether that error is harmless. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

Like federal harmless-error analysis, state harmless-error analysis is stricter if the defendant has failed to object at trial to the jury charge in question. Here, because the Court of Criminal Appeals determined that Smith had failed to raise his claim of error before the trial court, it applied the *Almanza* "egregious harm" standard, which is to say that reversal is required only if the defendant "'has not had a fair and impartial trial.'" *Id.* (quoting TEX. CODE CRIM. PROC. art. 36.19).

Carefully reviewing "the entire trial record," the court concluded that Smith had failed to establish that the unobjected-to jury nullification instruction caused him egregious harm, and therefore, under well-established state precedent, denied relief. *Smith III*, 185 S.W.3d, at 468, 472; J.A. 289, 298. This appeal followed.

SUMMARY OF ARGUMENT

Petitioner and his *amicus*, like the petitioners in the related *Brewer* and *Abdul-Kabir* cases, endeavor to frame this case as an instance where this Court must act to protect its mandate from lower courts intent on defying the Supreme

Court. Toward that end, the entire narrative they construct is one where the Court of Criminal Appeals and the Fifth Circuit are both engaged in the willful disregard of this Court's authority. Were that the case, the appropriate resolution of these cases would be clear: unanimous reversal, and an unambiguous articulation of this Court's supreme authority, as has been done so many times in decades past.

But Petitioner's narrative is fundamentally false, and not consonant with the good character of the state and federal judges who have attempted for many years to understand and apply the intertwined and evolving standards that govern capital punishment litigation.

Once the rhetoric is put aside, this case presents a routine application of state harmless-error doctrine. Petitioner, of course, cannot argue that the application was erroneous as a matter of state law; rather, his lone substantive claim before this Court is that the U.S. Constitution bars the application of state harmless-error doctrine to *Penry*-type errors. But the Court has never so held. Nor should it now.

On remand from this Court, the Court of Criminal Appeals began with this Court's conclusion that *Penry* error had occurred and, under state precedent, proceeded to assess the remedy for that constitutional error. Because Petitioner's counsel made a strategic trial choice not to object to the specific instruction given the jury—despite being expressly invited by the trial court to do so—the Court of Criminal Appeals properly held that the state-law standard for unpreserved error would apply.

Under any standard of review, the error in this case was harmless. Examining the quantum, weight, and nature of the mitigating evidence at issue, it cannot be said to have had an appreciable impact on the sentence. Indeed, defense counsel placed so little emphasis on the evidence in question that it occupied less than three percent of his time in closing argument.

Because there is no federal constitutional prohibition on the application of state harmless-error doctrine to *Penry* error, and because the state court applied long-standing precedent to resolve this state habeas proceeding, that court's harmless-error ruling constitutes an

adequate and independent state ground that divests this court of appellate jurisdiction.

ARGUMENT

The whole of Petitioner's brief makes two central points, upon which all of his other arguments depend: *first*, that this Court's earlier summary reversal in this case necessarily foreclosed any subsequent application of state harmless-error analysis, and *second*, that the Court of Criminal Appeals "revisited" its earlier conclusion that Smith had not defaulted his *Penry* claim in a naked attempt to avoid this Court's summary reversal. Both points are incorrect.

Once those misstatements are refuted, all that remains is to assess whether there is any federal constitutional bar to the application of state harmless error doctrine in this case. There is no such bar, and so the lower court's dispositive application of that doctrine constitutes an adequate and independent state ground that forecloses federal jurisdiction over this appeal.[10]

I. THERE IS NO GENUINE ISSUE CONCERNING THE APPLICATION OF THE MANDATE FROM THIS COURT'S PRIOR SUMMARY REVERSAL.

The effective functioning of our judicial system—and indeed, the rule of law—requires that lower state and federal courts honor this Court's decisions. This obligation is particularly acute where, as here, those decisions

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[10] It should be noted that even if the Court of Criminal Appeals's decision is upheld, Smith could still attempt to pursue federal habeas relief. As noted herein, Smith filed a petition for federal habeas in the Northern District of Texas, but this proceeding was dismissed without prejudice so that Smith could pursue his state postconviction proceeding. *See supra* Statement of the Case. The State has, by written agreements with Smith's counsel, agreed that it will not assert any limitations bar to renewed federal habeas proceedings initiated by Smith in a timely manner following the final resolution of his state habeas application. Of course, the State did not waive its right to assert any other defense to Smith's claims. These agreements are reproduced and bound as an appendix to Respondent's Brief.

attempt to resolve difficult points of constitutional law that affect the life or death of capital defendants. A lower court that fails to respect the Court's judgments, particularly under these circumstances, has acted with "judicial impudence." Charles Fried, *Impudence,* 1992 SUP. CT. REV. 155, 157, 192-93.

Notwithstanding Smith's narrative to the contrary, neither the Court of Criminal Appeals nor the Fifth Circuit has exhibited such impudence. Rather, both courts—and the principled jurists who sit on each—have struggled to understand and to faithfully apply this Court's rulings.

A. The Texas Court of Criminal Appeals and the Texas Legislature Have Consistently Strived to Properly Implement the Court's Evolving Capital Jurisprudence.

Since *Furman v. Georgia*, 408 U.S. 238 (1972), Texas courts and the Texas Legislature have consistently strived to comply with the Court's evolving view of the constitutional parameters applicable to death penalty statutes. The Texas Court of Criminal Appeals has, throughout this period, demonstrated a commitment to properly implementing this Court's decisions.

1. *Furman* to *Jurek*: Texas's modified sentencing system is upheld.

Prior to *Furman*, Texas juries had been given broad discretion to choose between a death sentence and a period of confinement in capital cases. In *Furman*, the Court reviewed a Texas death sentence, as well as two Georgia capital sentences, to determine whether the "imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman*, 408 U.S., at 239 (per curiam). Five Justices answered this question affirmatively, each supporting his conclusion in a separate opinion. *Id.*, at 239-374.

The Texas Legislature responded to *Furman* in its next session by, *inter alia*, adopting procedures to guide juries in capital sentencing. Specifically, Texas instituted its three-issue inquiry as part of a separate evidentiary sentencing proceeding following a defendant's conviction for capital murder. In *Jurek v. State*, 522 S.W.2d 934 (Tex. Crim. App. 1975), *aff'd sub nom. Jurek v. Texas*, 428 U.S. 262 (1976), the Court of Criminal Appeals upheld the new Texas sentencing scheme, *id.*, at 937-38, concluding that the prescribed three-question inquiry complied with *Furman* by sufficiently directing, guiding, and channeling the jury's consideration of the punishment alternatives, *id.*, at 939.

Thirty-five States, including Texas, enacted death penalty statutes following *Furman*, each attempting to comply with its understanding of the Court's constitutional requirements for capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 179-81 n.23-24 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). In *Gregg* and its companion cases, the Court revisited the death penalty statutes of five States, including Texas. *Gregg* upheld the constitutionality of capital punishment *per se* and the particular capital procedure enacted by Georgia. *Id.*, at 187, 206-07.

Gregg marked the beginning of the Court's struggle to reconcile two competing principles commanded by the Eighth Amendment. The first principle, derived from *Furman*, is that "States must limit and channel the discretion of judges and juries to ensure that death sentences are not meted out 'wantonly' or 'freakishly.'" *Graham v. Collins*, 506 U.S. 461, 468 (1993) (quoting *Furman*, 408 U.S., at 310 (Stewart, J., concurring)). The second principle, first announced in *Woodson*, is that "States must confer on the sentencer sufficient discretion to take account of the 'character and record of the individual offender and the circumstances of the particular offense' to ensure that 'death is the appropriate punishment in a specific case.'" *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (plurality opinion)).

In *Jurek v. Texas*, Justices Stewart, Powell and Stevens determined that the death sentence imposed under the newly adopted Texas capital procedures satisfied the competing

constitutional requirements identified in *Furman* and *Woodson*.[11] The first principle was satisfied by the definitional requirements of the Texas capital murder statute, which effectively required a finding of one of five statutory aggravating factors prior to any consideration of a death sentence. *Id.*, at 270-71 (opinion of Stewart, Powell, and Stevens, JJ.).

The Justices concluded that whether the second principle was satisfied, "turn[ed] on whether the enumerated questions allow consideration of particularized mitigating factors." *Id.*, at 272. To answer this question, the Justices focused on the second special issue, which asks whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* The Justices concluded that the Court of Criminal Appeals would interpret the future dangerousness question in a manner that allowed the defendant to bring all relevant mitigating evidence to the jury's attention.[12] "By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.*, at 276.

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[11] *Jurek*, 428 U.S., at 276-77 (opinion of Stewart, Powell, and Stevens, JJ.); *accord id.*, at 277 (Burger, C.J., concurring in judgment); *id.*, at 277-79 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in judgment); *id.*, at 279 (Blackmun, J., concurring in judgment).

[12] The Justices relied on the Texas Court of Criminal Appeals's *Jurek* opinion, explaining the factors considered in determining the probability of the defendant's future dangerousness:

> [T]he jury could consider whether the defendant had a significant criminal record [and] the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand. [*Jurek v. State,*] 522 S.W.2d, at 939-40. *Jurek*, 428 U.S., at 272-73.

With that understanding, the Court upheld the Texas death penalty system. *See supra* fn.11.

2. *Franklin*: Texas's capital sentencing system accommodates the competing concerns of *Furman* and the *Lockett* line of cases.

Two years after *Jurek*, the Court overturned an Ohio death penalty statute that precluded the sentencer from considering certain categories of relevant mitigating evidence. *See Lockett v. Ohio*, 438 U.S. 586, 597-609 (1978) (plurality opinion); *id.*, at 613-27 (concurring opinions). The plurality stated that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (plurality opinion) (emphasis omitted).

The *Lockett* plurality observed that the defects in the Ohio statute could "best be understood by comparing it to the statutes upheld in *Gregg*, *Profitt* [*v. Florida*, 428 U.S. 242 (1976)], and *Jurek*." *Id.*, at 606. Thus, the *Lockett* plurality reaffirmed the interpretation of Texas's death penalty scheme set forth by Justices Stewart, Powell, and Stevens in *Jurek*.[13]

The Court next considered a constitutional challenge to the Texas special issues in *Franklin v. Lynaugh*, 487 U.S. 164 (1988). In *Franklin*, the defendant claimed that the Texas capital procedure erroneously precluded consideration of the mitigating circumstances of his good prison disciplinary record. *Id.*, at 170-72 (plurality opinion). The Court rejected this claim in a plurality opinion, concluding that Texas's second special issue provided an adequate vehicle for consideration of defendant's prison record as it related to his character. *Id.*, at 167-83 (White, J., joined by

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[13] Four years after *Lockett*, the plurality position was adopted as the holding of the Court in *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Rehnquist, C.J., and Scalia and Kennedy, JJ.). The plurality further noted that, at that time:

> [T]he Texas scheme has continued to pass constitutional muster, even when the Court laid down its broad rule in *Lockett* concerning the consideration of mitigating evidence. Simply put, we have previously recognized that the Texas Special Issues adequately 'allo[w] the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provid[e] for jury discretion.' We adhere to this prior conclusion. *Id.*, at 182 (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988)) (citation omitted).

3. *Penry I*: Texas's capital sentencing procedures do not always accommodate the competing concerns of *Lockett* and *Furman*.

In *Penry I*, a closely divided Court for the first time set aside a capital sentence based on its determination that the Texas special issues did not allow for sufficient consideration of the defendant's mitigating evidence. Johnny Paul Penry was convicted of the brutal rape and murder of Pamela Carpenter. 492 U.S., at 307-11. After presenting mitigating evidence of severe childhood abuse, mental retardation, and a related inability to learn from his experiences or mistakes, Penry was nonetheless sentenced to death. *Id.*, at 311. The Court reversed, holding that Texas's special issues were too limited to allow appropriate consideration of Penry's mitigating evidence. *Id.*, at 328.

Specifically, with regard to the first special issue concerning whether the crime was committed "deliberately," the Court concluded that because neither the statute nor the Court of Criminal Appeals had defined the term, the Court could not be certain that the jury "was able to give effect to the mitigating evidence . . . in answering the first special issue." *Id.*, at 322-23. With regard to Texas's second special issue concerning future dangerousness, the Court

determined that Penry's evidence that his mental retardation made him unable to learn from his mistakes was relevant "only as an *aggravating* factor because it suggests a 'yes' answer to the question of future dangerousness." *Id.*, at 323 (emphasis in original). Therefore, because the jury could not adequately give effect to Penry's mitigating evidence, the Court found his sentence unconstitutional. *Id.*, at 328.[14]

Following *Penry I*, both the Texas Court of Criminal Appeals and the Texas Legislature took action to comply with the Court's ruling. The Court of Criminal Appeals properly obeyed *Penry I*, expressly holding,

> whenever a capital defendant produces evidence of his own character, background, or the circumstances surrounding his offense which . . . has a tendency to reduce his moral culpability in a way not exclusively related to [the Texas special issues] . . . the United States Constitution forbids imposition of the death penalty upon him by a sentencer given no means to prescribe, based on such mitigating evidence, a less severe punishment. *Gribble v. State*, 808 S.W.2d 65, 75 (Tex. Crim. App. 1990).[15]

And the Court of Criminal Appeals quickly began granting relief in appropriate cases consonant with the Court's *Penry I* decision.[16] Likewise, the Texas Legislature acted swiftly in its next legislative session to place Texas in compliance with *Penry I* by revising the capital sentencing issues. Specifically, the Texas Legislature added a new

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[14] Significantly, the Court stressed that *Penry I* did not constitute a new rule; rather, the Court described its holding as an application of the rules of *Jurek*, *Lockett*, and *Eddings*. *See id.*, at 314-18.

[15] *See also James v. State*, 805 S.W.2d 415, 417 n.3 (Tex. Crim. App. 1990) (citing *Penry I*) ("We now know that if the record contains [*Penry*-type] mitigating evidence, an accused cannot be sentenced to death under our statutory scheme, consonant with the Eighth Amendment, unless [a *Penry*] instruction has been given.").

[16] *See, e.g.*, *Ex parte Goodman*, 816 S.W.2d 383, 385-86 (Tex. Crim. App. 1991); *Ex parte Williams*, 833 S.W.2d 150, 151-52 (Tex. Crim. App. 1992).

mitigating circumstances sentencing issue which a capital jury must now answer before the death penalty may be imposed.[17]

4. *Graham* and *Johnson*: the Court reaffirms that the Texas sentencing system properly accommodates the competing concerns of *Furman* and *Lockett*.

Four years later, the Court considered *Penry* claims arising in two more Texas cases, *Graham v. Collins*, 506 U.S. 461 (1993), and *Johnson v. Texas*, 509 U.S. 350 (1993). Both upheld the pre-1991 Texas sentencing statute.

Graham claimed that his mitigating evidence of youth, troubled family background, and positive character traits could not be adequately considered under the Texas sentencing system. 506 U.S., at 463. In rejecting his claim,[18] the Court observed that *Penry I* did not "effec[t] a sea change in this Court's view of the constitutionality of the former Texas death penalty statute," *id.*, at 474, and explained that Graham's mitigating evidence was not placed "beyond the jury's effective reach," *id.* Although Penry's evidence of mental retardation and severe childhood abuse mandated an affirmative answer to the Texas "future dangerousness" special issue, the Court observed that Graham's evidence "quite readily could have supported a negative answer" to this special issue, *id.*, at 475-76, and therefore concluded that

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[17] The new instruction reads as follows: "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." Act of May 17, 1991, 72d Leg., R.S., ch. 838, §1, 1991 Tex.Gen.Laws 2898, 2899 (codified at TEX. CODE CRIM. PROC. art. 37.071).

[18] Because the case came before the Court on federal habeas, the Court recognized that it had to determine whether granting relief to the defendant would create a "new rule" of constitutional law subject to the *Teague* doctrine. *Id.*, at 467-68; *see Teague v. Lane*, 489 U.S. 288 (1989).

the habeas relief sought by Graham was not "dictated" by *Penry I* or its predecessors, *id.*, at 476.[19]

Johnson likewise concerned mitigating evidence of youth. 509 U.S., at 352. Rejecting Johnson's claim, the Court reaffirmed the conclusion reached in *Graham* that "there is ample room in the [Texas second special issue's] assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination," *id.*, at 367-68. The Court reasoned that the "ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of [Texas's] second special issue." *Id.*

The *Johnson* Court also relied on the Texas Court of Criminal Appeals's understanding that the future dangerousness inquiry is a "comprehensive inquiry that is more than a question of historical fact." *Id.* The Court observed with approval that "[i]n reviewing death sentences imposed under the former Texas system, [the Court of Criminal Appeals] has consistently looked to a nonexclusive list of eight factors, which includes the defendant's age, in deciding whether there was sufficient evidence to support a 'yes' answer to the second special issue." *Id.* (citations omitted).

The Court reasoned that, in order to find a constitutional defect in Johnson's case, it would have to overrule *Jurek* and change the rule of *Lockett* and *Eddings*. *Id.*, at 372. Johnson's argument would require that *Jurek* be overruled because the "inevitable consequence" of his position was that in virtually

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[19] The Court also stated that it was not persuaded that *Penry I* could be extended to encompass the sorts of mitigating evidence Graham suggested "without a wholesale abandonment of *Jurek* and perhaps also of *Franklin v. Lynaugh*." *Id.* The Court read *Jurek* to hold that the circumstance of youth was given adequate consideration under Texas's special issues, and "[saw] no reason to regard the circumstances of Graham's family background and positive character traits in a different light." *Id.* The Court further explained, "Graham's evidence of transient upbringing and otherwise non-violent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse." *Id.*

all cases the Texas system would require a supplemental instruction. *Id.* Further, Johnson sought to change the rule of *Lockett* and *Eddings* because "[i]nstead of requiring that a jury be able to consider *in some manner* all of a defendant's relevant mitigating evidence, [Johnson's] rule would require that a jury be able to give effect to mitigating evidence *in every conceivable manner in which the evidence might be relevant.*" *Id.* (emphasis added). The Court refused to accept this rule because it would require that capital juries be instructed in a manner that left them "free to depart from the special issues in every case . . . remov[ing] all power on the part of the States to structure the consideration of mitigating evidence," a result the Court had consistently rejected. *Id.*, at 373 (citing *Boyde v. California*, 494 U.S. 370, 377 (1990); *Saffle v. Parks*, 494 U.S. 484, 493 (1990); *Franklin*, 487 U.S., at 181 (plurality opinion)).[20]

5. *Penry II*: a supplemental jury instruction fails to meet *Penry I*'s requirements.

In *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), the Court again reversed Johnny Paul Penry's death sentence, this time after his second trial. At that second trial, the district court had submitted to the jury a supplemental "nullification" instruction in an attempt to comply with *Penry I*. *See Penry v. State*, 903 S.W.2d 715, 726 (Tex. Crim. App. 1995).

The Court noted two ways to interpret the *Penry II* supplemental instruction, neither of which met the requirements of the Eighth Amendment. First, it could be viewed as an instruction to consider Penry's mitigating evidence in determining a truthful answer to each special

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[20] The Court concluded by acknowledging that its capital sentencing jurisprudence sought to reconcile two competing and valid principles from *Furman*: (1) allowing mitigating evidence to be considered, and (2) guiding the discretion of the sentencer. *Id.* The Court reaffirmed that "our holding in *Jurek* reflected the understanding that the Texas sentencing scheme 'accommodates *both* of these concerns.'" *Id.* (quoting *Franklin*, 487 U.S., at 182 (plurality opinion)).

issue. *Id.*, at 798. But that placed the jury in no better position than it had been in *Penry I* because the special issues were insufficiently broad to cover Penry's evidence of mental retardation and childhood abuse. *Id.* Alternatively, the instruction could be understood to inform the jurors to answer one of the special issues "no" if they believed the mitigating evidence made a life sentence appropriate. *Id.* However, that made the jury charge internally contradictory and placed the jurors in an impossible situation. *Id.*, at 799.

Because "it would have been both logically and ethically impossible for a juror to follow both sets of instructions," *id.*, the Court concluded that the result of the supplemental instruction was to "insert[] an element of capriciousness into the sentencing decision" making the instruction "an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence." *Id.*, at 800.

Following the Court's decision in *Penry II*, Penry was retried on punishment only. *See Penry v. State*, 178 S.W.3d 782, 784 (Tex. Crim. App. 2005). In addition to the three special issues that had been given twice before, a fourth issue was included asking the jury to include an analysis of Penry's "personal moral culpability" before imposing a death sentence. *Id.*[21]

Penry was once again sentenced to death. *Id.* On direct appeal, Penry argued that the instruction to special issue four precluded the jury from considering Penry's mental impairment as mitigating evidence unless the jury concluded that Penry was mentally retarded. *Id.* The Court of Criminal Appeals held that there was a reasonable likelihood that the instruction precluded the jury from giving effect to mitigating

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[21] The fourth issue asked:

> "Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, Johnny Paul Penry, that there is a sufficient mitigating circumstance or circumstances to warrant that a . . . sentence of life imprisonment rather than a death sentence be imposed." *Id.*, at 792.

evidence of mental impairment that did not amount to mental retardation. *Id.*, at 783-84. Finding error, the court turned to the question whether the error in the trial court's charge was harmful, under *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985) (op. on reh'g), ultimately determining that it could not find the charge error harmless, and that it required yet another resentencing proceeding. *Id.* Accordingly, the case was reversed and remanded for a new trial on punishment. *Id.*, at 789.[22]

B. Just as It Has in All the Previous *Penry* Cases, the Court of Criminal Appeals Fully Complied With the Mandate of This Court's Summary Reversal in *Smith II*.

Taken as a whole, the Court's capital sentencing jurisprudence from *Furman* through the *Penry* line of cases reflects the Court's struggle to define the constitutional

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[22] Finally, in its last *Penry*-line decision prior to *Smith*, the Court reviewed and rejected the Fifth Circuit's analytical framework for *Penry* claims in *Tennard v. Dretke*, 542 U.S. 274, 283-87 (2004). Tennard was sentenced to death under the Texas special issues in use prior to *Penry I*. *Id.*, at 278. The Fifth Circuit held that Tennard was not entitled to relief because his low IQ, in and of itself, did not meet the Fifth Circuit's "constitutional relevance" test and he also did not meet the court's "nexus" test by showing that his crime was attributable to his low IQ. *Id.*, at 282. The Court rejected the Fifth Circuit's "constitutional relevance" and "nexus" tests for *Penry* claims. *Id.*, at 284. The Court confirmed that mitigating evidence introduced in a capital sentencing proceeding is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* (internal quotation omitted).

The Fifth Circuit has recently issued an en banc decision involving a *Penry* claim in light of the Court's opinions in *Tennard* and *Smith*. *See Nelson v. Quarterman*, 2006 WL 3592953 (CA5 December 11, 2006). In *Nelson*, the Fifth Circuit noted that in *Smith* and *Tennard* the Court had made clear that, when evaluating whether a *Penry* instruction would be required, "the relevant inquiry under its [*Penry*] precedent was whether there was a reasonable likelihood that the jury would interpret the Texas special issues in a manner that precluded it from fully considering and giving full effect to all of the defendant's mitigating evidence," *id.*, at *4, and confirmed that it would apply this standard going forward, *id.*, at 15.

requirements applicable to death penalty statutes. The Texas Court of Criminal Appeals's cases during this period reflect Texas's parallel struggle to meet the Court's evolving capital sentencing standards. Throughout this period, the Texas Court of Criminal Appeals, like the Texas Legislature, has consistently acted in good faith to implement the Court's decisions on capital sentencing.

Just so, in the case sub judice. The basis of the *Smith II* summary reversal was relatively straightforward. Three holdings are central to *Smith II*:

- There can be no heightened "screening test" of "constitutional relevance" that limits what mitigating evidence qualifies as *Penry* evidence. 543 U.S., at 43-44; J.A. 230-32. This conclusion flowed directly from *Tennard v. Dretke*, 542 U.S. 274 (2004)—which had been decided two months *after* the Court of Criminal Appeals opinion had issued in *Smith I*.
- "Nullification" instructions, regardless of their clarity, cannot cure a *Penry* violation. *Smith II*, 543 U.S., at 47-48; J.A. 234-36. The Court of Criminal Appeals had considered the *Smith* nullification instruction to be permissible because it was considerably less ambiguous than was the nullification instruction disapproved in *Penry II*, but this Court concluded that additional clarity could not render the instruction constitutionally sufficient. *Id.*
- Therefore, the sentencing in *Smith* violated *Penry*. *Id.*, at 48-49; J.A. 236.

On remand, in *Smith III* the Court of Criminal Appeals respected and gave force to each of these separate holdings. Specifically, the court began its analysis with the premise—mandated by this Court's summary reversal—that Smith's sentencing had produced *Penry* error, that all the potentially mitigating evidence was subject to *Penry* analysis, and that the nullification instruction had not cured the *Penry* error. *Smith III*, 185 S.W.2d, at 466-67; J.A. 287-88.

From that starting point, the state court then applied its traditional harmless-error analysis to determine whether automatic reversal was required. *See infra* Section III.

Petitioner's implicit argument—which he never comes straight out and says—is that doing so violated, not the letter, but really the *spirit* of the summary reversal. But that contention does not withstand scrutiny.

To be sure, this Court's summary reversal did not say, "the case is remanded to assess whether harmless-error analysis applies to *Penry* error." But neither did it say, "because harmless-error analysis can never apply to *Penry* error, the case is remanded with instructions to order a new trial to resentence Smith." Rather, the Court found *Penry* error, and then remanded for the lower court to determine what next steps were required in Smith's case under Texas state habeas procedures.

The necessary consequence of Smith's interpretation of the "spirit" of *Smith II* would be that every person who was sentenced to death under Texas's pre-1991 special issues and who proffered any quantum of potentially mitigating IQ or parenting evidence must necessarily be resentenced. But that was not the holding of *Smith II*, nor was it compelled by the mandate.

Instead, the Court of Criminal Appeals accepted and carefully followed *Smith II*'s holding that Smith's jury charge was constitutionally defective. Because nothing in *Smith II* suggested that the full panoply of criminal-law doctrines ordinarily applicable in Texas state habeas proceedings would no longer apply, the state court followed those established doctrines in assessing a remedy. Thus, applying Texas's harmless-error doctrine, the court concluded that, in light of the full record, the conceded constitutional error in Smith's charge was not sufficiently harmful to require resentencing. Doing so was unexceptional, an ordinary application of state law on state habeas, and entirely consistent with this Court's mandate.

II. THE COURT OF CRIMINAL APPEALS IN *SMITH III* DID NOT "REVISIT" ITS EARLIER CONCLUSIONS ON PROCEDURAL DEFAULT; RATHER, IT CONTINUED TO CONSIDER THE CASE ON THE MERITS AND SIMPLY APPLIED LONGSTANDING TEXAS HARMLESS-ERROR ANALYSIS.

Another major premise of Petitioner's challenge to the decision of the Court of Criminal Appeals is that the court

improperly "revisited" its prior determination that Smith had adequately preserved error at trial. Pet'r Br. at 13, 40-50. That claim is likewise incorrect.

In making this argument, Petitioner conflates the doctrines of procedural default and harmless error. In *Smith I*, the Court of Criminal Appeals did not deem Smith's challenge to the nullification instruction to be procedurally defaulted, although four of its nine judges would have done so. *Smith I*, 132 S.W.3d, at 423-24 (Hervey, J., concurring); *id.*, at 428 (Holcomb, J., concurring); J.A. 205-06, 214. Instead, the court chose to resolve and reject his claim on the merits.

Smith III did not "revisit" that finding. Just as before, the Court of Criminal Appeals in *Smith III* declined to find Smith's *Penry* challenge to be procedurally defaulted. And just as before, the court proceeded to address it on the merits.

Although both procedural default and state harmless error analyses are affected by preservation of error, the two are not identical. Procedural default is a complete bar, and hence a far more serious impediment to relief. Given the degree to which *Penry I* changed the landscape of Texas capital sentencing, and the futility of raising such claims before that decision, the Court of Criminal Appeals long ago made the reasonable determination, post-*Penry I*, to excuse defendants from procedural default in *Penry* claims. *See infra* Section II.B. But, at the same time, the Court of Criminal Appeals continued to hold *Penry* defendants to the well-established state standard for harmless error. *See infra* Section III.A.

Thus, when *Smith I* was decided, the court resolved and rejected his claim on the merits, finding no constitutional violation in the jury charge, which—under applicable state law—obviated the necessity of applying harmless error and evaluating whether the error had been preserved. *See infra* Section II.A. Having never made that evaluation in *Smith I*, there was nothing to "revisit" in *Smith III*.

A. Texas Resolves Issues of Jury Charge Error Through a Two-Step Harmless-Error Analysis Under *Almanza*.

In addressing Smith's claim on the merits, the court followed the longstanding Texas procedure for jury charge error: to subject such claims to the harmless-error analysis required by *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985), and Texas Code of Criminal Procedure art. 36.19.[23] The *Almanza* standard contains two sequential steps: "First, the reviewing court must determine whether the jury charge contains error. Second, the court must determine whether sufficient harm resulted from the error to require reversal." *Id.*

The only difference between *Smith I* and *Smith III* in this regard is that, in *Smith I*, the court found no error, and so never made it past step one of *Almanza*. In *Smith III*, the court began with this Court's finding of error, and so skipped step one entirely and proceeded directly to step two of *Almanza*, assessing harm.

The harm analysis, in turn, contains two different levels of scrutiny, reflecting the Court of Criminal Appeals's conclusion that Article 36.19 "separately contains the standards for both fundamental [charge] error and

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[23] As the Court of Criminal Appeals recently explained, "[o]ur case law is clear that when there is jury-charge error, whether objected to or not objected to, the standard for assessing harm is controlled by *Almanza*. . . ." *Bluitt v. State*, 137 S.W.3d 51, 53 (Tex. Crim. App. 2004). *Almanza* applied Texas Code of Criminal Procedure art. 36.19, which provides:

> Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14, 36.15, 36.16, 36.17 and 36.18 [each regarding jury charge in criminal trial] has been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial. All objections to the charge and to the refusal of special charges shall be made at the time of the trial.

ordinary reversible [charge] error." *Almanza*, 686 S.W.2d, at 171.[24] As the court explained:

> "If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is 'calculated to injure the rights of defendant,' which means no more than that there must be some harm to the accused from the error. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless.
>
> On the other hand, if no proper objection was made at trial and the accused must claim that the error was 'fundamental,' he will obtain a reversal only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.'" *Id.*

Thus, under *Almanza*, the applicable harm standard turns on whether the accused timely and properly objected to the error, but this only begins the inquiry into harmless error. *See id.*[25]

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[24] On direct appeal, Texas state courts apply the "beyond a reasonable doubt standard" of *Chapman v. California*, 386 U.S. 18, 21 (1967), to constitutional jury-charge errors that have been preserved. *Jimenez v. State*, 32 S.W.3d 233, 237-38 (Tex. Crim. App. 2000). As to all other jury-charge errors—on direct and on habeas, preserved and unpreserved—*Almanza* applies. *See id.*, at 236-38; *see also infra* fn.26.

[25] Notably, Texas's *Almanza* standard is no more onerous to habeas petitioners than the federal habeas standard expressed in *Brecht*, and is less onerous than the federal *Olano* standard. In federal habeas proceedings, constitutional error will generally be considered harmful only if it "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). *Almanza* similarly requires that the habeas petitioner prove by a preponderance of the evidence that the error precluded a fair and impartial trial. *Almanza*, 686 S.W.2d, at 171.

Under *Olano*, in the federal system unpreserved constitutional error may be reviewed by the court of appeals only if it is "plain error," FED. R. CIV. PROC. 52(b). *United States v. Olano*, 507 U.S. 725, 735 (1993). As the Court recently explained, under Rule 52(b) "'before an

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B. Smith's Assertions That *Almanza* Was Inapplicable Are Inconsistent with Well-Established Texas Law.

When reviewing allegations of unobjected-to constitutional jury charge error in state habeas proceedings, the Court of Criminal Appeals has traditionally applied the *Almanza* standard.[26] Likewise, contrary to Smith's assertion that the Court of Criminal Appeals suddenly and uncharacteristically applied *Almanza* to his *Penry* claim, Pet'r Br., at 47, 47 n.16, for many years prior to its decision in his case the Court of Criminal Appeals regularly and repeatedly applied *Almanza* analysis to *Penry* claims.[27] In short, in state habeas cases like

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appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Cotton*, 535 U.S. 625, 631 (2002) (quoting *Johnson v. United States*, 520 U.S. 461, 466-467 (1997)) (internal quotations omitted). The *Almanza* standard is less onerous than *Olano* in that the federal standard is discretionary—the courts of appeals have discretion whether to reverse—whereas state courts must reverse where *Almanza* is satisfied.

[26] For example, *Almanza* was applied in the habeas context shortly after it was issued in a case that concerned a habeas petition claiming denial of due process due to charge error, but containing almost no factual evidence. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). The court dismissed the habeas petition without prejudice because the petitioner had failed to sufficiently allege a constitutional error. *Id.* The court also applied *Almanza* in analyzing jury charge error in the habeas context in *Ex parte Patterson*, 740 S.W.2d 766, 776-77 (Tex. Crim. App. 1987), modified on other grounds, *Ex parte Beck*, 769 S.W.2d 525, 528 (Tex. Crim. App. 1989); *see also Ex parte White*, 726 S.W.2d 149, 150 (Tex. Crim. App. 1987); *Ex parte Tuan Van Truong*, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989).

[27] The following cases illustrate the Court of Criminal Appeals's consistency in applying *Almanza* to *Penry* error. In **1993**, for example, the court applied *Almanza* to appellant's reverse-*Penry* error claim, stating that "[i]n the case of charge error that was properly objected to at trial, reversal is called for unless the error is harmless." *Flores v. State*, 871 S.W.2d 714, 723 (Tex. Crim. App. 1993). In **1994**, the court explicitly applied *Almanza* to appellant's *Penry* claims. *Coleman v. State*, 881 S.W.2d 344, 356-57 (Tex. Crim. App. 1994). Concluding that the appellant

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Smith's, involving unobjected-to constitutional jury charge error, the Texas Court of Criminal Appeals has historically applied the *Almanza* standard.

Smith and his *amicus* attempt to cast the Court of Criminal Appeals's *Almanza* jurisprudence as inconsistent by pointing to a small set of cases issued soon after *Penry I*. Pet'r Br., at 47 n.16; Amicus Br., at 17-19. But none of these cases stands for the proposition that *Almanza* is inapplicable to *Penry* claims.[28] Each of the cases that

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had failed to show error, the court did not reach the harm analysis. In **1995**, the court considered an appellant's unobjected-to *Penry* error claim, and applied the *Almanza* standard, denying relief because egregious harm was not shown. *Chambers v. State*, 903 S.W.2d 21, 34 (Tex. Crim. App. 1995). In **1996**, the Court of Criminal Appeals applied *Almanza* to unobjected-to *Penry* error in *Goff v. State*, 931 S.W.2d 537 (Tex. Crim. App. 1996). Because the court concluded that the nullification instruction complied with *Penry I*, it held that Goff was not egregiously harmed and denied relief. *Id.*, at 551 and n.13. In another **1996** case, the court acknowledged that *Almanza* applies to *Penry* error, citing *Almanza* for its holding that "failure to object to an included charge waives all but egregious error." *Cantu v. State*, 939 S.W.2d 627, 647-48 (Tex. Crim. App. 1996). In **2000**, the court applied *Almanza*'s "some harm" standard to preserved *Penry*-type error. *Ovalle v. State*, 13 S.W.3d 774, 786 (Tex. Crim. App. 2000). In **2002**, the court again applied *Almanza*, denying appellate relief on one of defendant's points of error alleging that charge error prevented the jury from considering his mitigating evidence. *Turner v. State*, 87 S.W.3d 111, 117 (Tex. Crim. App. 2002). In **2004**, after the court agreed that the trial judge had erred in a jury instruction regarding mitigating evidence, the court applied the *Almanza* "egregious harm" standard because the defendant did not object at trial. *Scheanette v. State*, 144 S.W.3d 503, 507 (Tex. Crim. App. 2004).

[28] In *Ex parte McGee*, 817 S.W.2d 77 (Tex. Crim. App. 1991), the defendant preserved error by requesting a supplemental instruction, and the court did not need to engage in a harm analysis because, like *Penry*, McGee was mentally retarded (IQ of 66), and therefore "just as in [*Penry I*], [the mitigating evidence] goes beyond the scope of the special issues." *Id.*, at 80. Similarly, in *Ex parte Goodman*, 816 S.W.2d 383 (Tex. Crim. App. 1991), the petitioner timely requested a nullification instruction which was denied by the trial judge, thus preserving error. *Id.*, at 385. The court reversed because, as in *Penry* and *Ex parte McGee*, the petitioner's evidence of mental retardation (IQ of 56) was a "double-edged sword." *Id.*, at 386. Likewise, in *Ex parte Williams*, 833 S.W.2d 150 (Tex. Crim. App. 1992), where the defendant had an IQ of 67, the Court of Criminal Appeals concluded that, in light of *Penry I*, "applicant's evidence

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Petitioner and his *amicus* cite to are cases handed down immediately post-*Penry I* involving defendants whose trials had occurred prior to *Penry I* and who had not alleged *Penry* error until after *Penry I*. The Court of Criminal Appeals, in *Black v. State*, had declared that this particular category of defendants would be treated as if they had preserved *Penry* error at trial. *See Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991); *id.*, at 374 (Campbell, J., concurring). Likewise, the cases cited by Smith to support his assertion that "the CCA has imposed defaults based on the absence of contemporaneous objection in several prior cases, including cases involving alleged *Penry* error," Pet'r Br., at 45, demonstrate precisely the opposite.[29]

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of mental retardation is double-edged, in that it simultaneously ameliorates fault and indicates future dangerousness, and as such we can not be sure that the jury could give it mitigating weight when answering the submitted issues." *Id.*, at 152. Finally, in *Ex parte Baldree*, 810 S.W.2d 213, 217 (Tex. Crim. App. 1991), the Court of Criminal Appeals did not reach a harm analysis because it concluded that the proffered evidence did not exceed the scope of the special issues.

[29] Smith points to *Nichols v. Scott*, 69 F.3d 1255, 1266 (CA5 1995) and *Turner v. Johnson*, 1997 U.S. App. LEXIS 12669 (1997), to support this assertion. On examination, both cases are directly to the contrary. In the underlying state case, *Nichols v. State*, 754 S.W.2d 185, 198 (Tex. Crim. App. 1988), the Court of Criminal Appeals not only did not procedurally default Nichols's charge error claim, it explicitly applied *Almanza* (a test on the merits), explaining:

> The failure to object to the charge waives all but fundamental error. Art. 36.19, V.A.C.C.P.; *Duffy v. State*, 567 S.W.2d 197, 204 (Tex.Cr.App. 1978) *cert. denied*, 439 U.S. 991, 58 L. Ed. 2d 666, 99 S. Ct. 593 (1978). The error, to constitute fundamental proportion, must be egregious and create such harm that it deprives appellant a fair and impartial trial. Art. 36.19, *supra; Almanza v. State*, 686 S.W.2d 157, 171-72 (Tex.Cr.App. 1985). After a careful review of the totality of the record, we find no such error or harm. *Nichols*, 754 S.W.2d, at 198.

Smith's citation to *Turner v. Johnson*, 1997 U.S. App. LEXIS 12669 (1997), for proof that the Court of Criminal Appeals has procedurally defaulted charge error cases is also misleading. Turner claimed on direct appeal that a particular definition in the charge had not been properly defined. *Turner v. State*, 805 S.W.2d 423, 430 (Tex. Crim. App. 1991). After observing that Turner had not objected at trial, the court proceeded

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More fundamentally, the *Almanza* test, by its terms, presupposes that it will be applied to some claims that (1) were not preserved, and (2) were not held to be procedurally defaulted. Because *Almanza* is a merits test, the entire second prong (looking to egregious harm for unpreserved error) *would be utterly superfluous* if every single unpreserved claim were procedurally defaulted before even getting to the merits. But, because state law contemplates some jury-charge errors (like *Penry* errors) will not be defaulted but are nonetheless unpreserved at trial, the *Almanza* egregious harm test has been traditionally applied.

III. THE COURT OF CRIMINAL APPEALS PROPERLY APPLIED HEIGHTENED HARMLESS-ERROR ANALYSIS UNDER *ALMANZA*.

Under any harmless-error standard, even the least searching, Smith's sentence should be upheld. Therefore, there is no basis for Smith to challenge the state court's implementation of state law to assess harmless error. That is, Smith cannot ask this Court to assess if the Texas court properly applied Texas law; Smith can ask only that the demands of the Constitution be enforced. Because the Constitution does not require automatic reversal of *Penry* errors, and because any harmless-error analysis would yield the same result, Smith's challenge should fail.

Nevertheless, the Court of Criminal Appeals carefully applied established Texas law, and correctly concluded that Smith could not satisfy the *Almanza* egregious harm standard.

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to consider the merits of his claim, concluding that there was no reversible error because "[t]he charge . . . limited the definition . . . by applying it to the factual context. . . ." *Id.*, at 431; *see also Turner v. Johnson*, 1997 U.S. App. LEXIS 12669 at *28 (noting that "[o]n direct appeal the Texas Court of Criminal Appeals found no reversible error in the instruction as a matter of state law"). Again, the Court of Criminal Appeals did not procedurally default this claim, but rather rejected it on the merits.

A. The Texas Court of Criminal Appeals Properly Applied *Almanza*'s Egregious Harm Standard Because Smith Did Not Timely Object to the Nullification Instruction.

On remand, the Court of Criminal Appeals began with this Court's holding that there was constitutional error, and so turned to step two of the *Almanza* test, whether that error was harmless. Because Smith chose at trial to attack the constitutionality of Texas's entire sentencing scheme rather than object to the proposed supplemental instruction in his case—or alternatively offer a different instruction—he failed to preserve the objection subsequently raised in his second state habeas proceeding, that the language of the nullification instruction prevented giving effect to his mitigating evidence because it placed the jurors in an unconstitutional ethical quandary.

In order to preserve trial error under Texas law, an appellant's trial objections must have "specifically alerted the trial judge to the alleged error he urges on appeal." *Satterwhite v. State*, 858 S.W.2d 412, 430 (Tex. Crim. App. 1993). And, "[w]here his trial objections do not comport with his arguments on appeal, appellant has failed to preserve error on those issues." *Goff v. State*, 931 S.W.2d 537, 551 (Tex. Crim. App. 1996); TEX. R. APP. P. 33.1(a). As the Court of Criminal Appeals has observed, "the record must show that . . . the complaint was made to the trial court by a timely request, objection, or motion that . . . stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint." *Goff*, 931 S.W.2d, at 551.[30]

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[30] In the specific context of jury charge error in a criminal case, Article 36.14 of the Texas Code of Criminal Procedure provides in relevant part:

> Before [the] charge is read to the jury, the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection. Said objections may embody errors claimed to have been committed in the charge, as

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Penry I made clear that, when a Texas jury could not give meaningful effect to an accused's mitigating evidence through Texas's special issues, the defendant was constitutionally entitled to further instructions "informing the jury that it could consider and give effect" to such evidence "by declining to impose the death penalty." *Penry I*, 492 U.S., at 328; *see also Graham*, 506 U.S., at 474. Indeed, in *Penry II*, the Court observed that in *Penry I* it had described the kinds of supplemental jury instructions that could be given in a Texas capital trial to "comply with our mandate" and "alleviate" the Court's Eighth Amendment concerns. *Penry II*, 532 U.S., at 802-03.[31]

In Smith's trial, which took place two years after *Penry I*, it is undisputed that: (1) the trial court attempted to comply with *Penry I* in Smith's case by preparing a supplemental instruction regarding his mitigating evidence; (2) Smith was provided with the supplemental instruction in writing that the trial court planned to submit to comply with *Penry I*; (3) Smith was also given the express opportunity to object to the content of the

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well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts . . . Compliance with the provisions of this Article is all that is necessary to preserve, for review, the exceptions and objections presented to the charge and any amendment or modification thereof. TEX. CODE CRIM. PROC. art. 36.14.

Additionally, Texas law provides that written requests for special (additional) charges are sufficient to raise the issues in the requested charges, calling the trial court's attention to errors or omissions in the jury charge, and preserving error on those issues. *See* TEX. CODE CRIM. PROC. arts. 36.15-.16.

[31] Specifically, the Court stated in *Penry II* that it had, by way of example, indicated that the trial court could comply with its ruling by "defining the term 'deliberately' in [Texas's] first special issue 'in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability." *Id.*, at 803 (citing *Penry I*, 492 U.S., at 323). The Court noted that it had also indicated that a supplemental "clearly drafted catchall instruction" could have been used to comply with *Penry I*. *Id.* Thus, in *Penry I* the Court expressly directed Texas courts to use supplemental instructions in *Penry* claim cases in order to comply with its mandate.

instruction, or to propose modified or different instructions, *see* J.A. 20-22, and (4) he deliberately chose not to do so. Rather, in contravention of the Court's direction in *Penry I*, Smith took the position at trial and on direct appeal, that the trial court *could never* submit any supplemental instructions consistent with Texas law, and therefore the entire Texas sentencing scheme was unconstitutional as applied to him.[32]

The trial court in Smith's case struggled with the difficult dilemma confronted by Texas courts for the two-year period after *Penry I*. The most direct and logical way to respond to *Penry I* would have been to draft a new special issue to submit to the jury, but doing so required a change in statute, and the Texas Legislature meets only every two years. So after *Penry I* was issued in 1989, two years passed before the legislative response (creating a new special issue) in 1991. In the interim, trial judges were left to try to craft jury instructions that would cure the error. Thus, Smith's trial judge had two basic options in order to try to comply with *Penry I*:

(1) give the jury a supplemental instruction defining the term "deliberately" in special issue one to "clearly direct the jury to consider fully [Smith's] mitigating evidence," *Penry I*, 492 U.S., at 323; or

(2) give a catchall nullification instruction, like the one actually given in Smith's case, which required the jury to "consider any evidence which, in your opinion, is mitigating," J.A. 106, and then answer one of the special issues "no" if the mitigating evidence led them to believe that Smith should not receive a death sentence, even if they would have otherwise answered the special issue "yes," J.A. 107.

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[32] *See* J.A. 7-10 (Smith's "Motion to Declare Tex. Code Crim. Proc. Ann. Art. 37.071 Unconstitutional As Applied"), J.A. 11-16 (Smith's "Motion to Declare Tex. Code Crim. Proc. Ann. Art. 37.071 Unconstitutional"), and J.A. 132-34 (Smith's point of error number six on direct appeal).

The trial court picked option two. Today, we know that choice was wrong.[33] In hindsight, had the judge instead picked option one instead, defining "deliberateness," under the terms of *Penry II*, that would have cured the problem. 532 U.S., at 802-03. But, unfortunately, the judge did not.

At the time, unsure of which option was best, the trial judge affirmatively solicited defense counsel's help:

> "If you see something in that charge that you'd like worded differently or you think could be made clearer or better, I'm always willing to entertain different wording or different ways of putting the idea. So if you come up with something you like better, just let me know and I'll look at it." J.A. 21.

Smith's counsel, however, made the deliberate decision to submit nothing at all, and so the court was left with the instruction it had already drafted. Unlike Penry's counsel—who "offered two definitions of 'deliberately' that the trial court refused to give," *Penry II*, 532 U.S., at 803—Smith's counsel did not do anything to urge option one. Instead, Smith's counsel decided, in effect, to go "all or nothing." So he filed two motions, both seeking to declare

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[33] Although in *Penry II* the Court stated that giving the jury a "clearly drafted catchall instruction on mitigating evidence" might have sufficed, 532 U.S., at 802-03, in *Smith II* the Court appears to have changed its mind, concluding that drafting the instruction more clearly only "intensified the dilemma faced by ethical juries," *Smith II*, 543 U.S., at 48; J.A. 235. While in some other States (*e.g.* weighing States) a "catchall" instruction is plainly sufficient, the legislatively-drafted special issues in Texas limited the effect of a mere instruction. Presumably, with respect to Texas, the *Penry II* Court was originally contemplating some sort of clear and unambiguous "nullification" instruction when it referred to a "clearly drafted catchall instruction," because—absent the Legislature's drafting a new special issue for the jury to answer, as it did in 1991—a "catchall instruction" would alter only the *input* to the jury and could not alter the *output* from the jury; thus, the only way for a jury to implement the catchall instruction would be to answer "no" to one of the preexisting special issues, which would make it a "nullification" instruction. In any event, in *Smith II*, the Court made clear that any nullification instruction, no matter how clear, is constitutionally infirm.

the Texas death penalty system unconstitutional on *Penry* grounds, J.A. 7-16, and, concurrently, he argued that Texas law prevented the judge from giving any supplemental instructions to the jury whatsoever.[34]

Smith's argument that the trial court lacked authority to submit any curative instructions was simply incorrect. First, the Court in *Penry I* specifically directed that submitting a supplemental instruction to accommodate *Penry* evidence was not only permissible but was required by the Constitution. *Penry I*, 492 U.S., at 328.

Second, although Smith echoes the faulty argument once again before this Court—*see* Pet'r Br., at 48 (asserting that, at the time of trial, it was "well-established in [Texas] state law" that the trial court "lacked power to solve the *Penry* defect by altering or supplementing the legislatively-prescribed special issues")—the Court of Criminal Appeals had repeatedly and explicitly held that supplemental instructions to cure *Penry* error were not only permissible but were required. *See, e.g., James v. State*, 805 S.W.2d 415, 417 n.3 (Tex. Crim. App. 1990) ("We now know that if the record contains such mitigating evidence, an accused cannot be sentenced to death under our statutory scheme, consonant with the Eighth Amendment, unless such an instruction has been given.") (citing *Penry I*); *Gribble v. State*, 808 S.W.2d 65, 75 (Tex. Crim. App. 1990).

Smith's trial decision to facially attack the entire statute but not the nullification instruction itself, despite clear Supreme Court and Texas case law indicating the propriety of such an objection, establishes Smith's failure to preserve the error he raised in state habeas. There is no

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[34] Smith's counsel argued that the "exclusive methodology for submission to the jury of special issues with regard to infliction of the death penalty are contained in [the Texas sentencing statute]." J.A. 9. He further asserted that submitting any supplemental instruction to his charge would be to impermissibly "create new law." *Id.* In his view, "For the trial court to create a scheme that would permit the jury to respond to [his] mitigating evidence would contradict the current status of the law." *Id.*

credible reason that Smith should not have objected to the nullification instruction as unconstitutional, other than his counsel's strategic decision to seek a categorical prohibition on the death penalty instead. Thus, Smith's actions invoke the foundational principles underlying the need to specifically present trial objections in a timely manner: "to inform the trial judge of the basis of the objection and afford him to the opportunity to rule on it." *Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977). Had Smith, like Penry, objected and asked the trial court to define "deliberateness" instead, the error in this case might have been avoided altogether.

Smith did not attack the constitutionality of the nullification instruction until he commenced his second state habeas proceeding. Given the trial court's express invitation for him to object to the text of that instruction before it was read to the jury, and given his strategic decision to decline that invitation, the Court of Criminal Appeals quite reasonably concluded that, for purposes of *Almanza* harmless-error analysis, Smith had not preserved his challenge to the nullification instruction.

B. Because Smith Received a "Fundamentally Fair" Trial, the Texas Court of Criminal Appeals Correctly Determined That He Did Not Need To Be Resentenced.

1. In order for unobjected-to jury-charge error to support reversal, the entire record must demonstrate that the error caused egregious actual harm to the accused.

Even for unobjected-to error, the Court of Criminal Appeals has established a comprehensive and systematic approach for conducting harm analysis, which was applied in this case. In *Almanza*, the court explained that, in cases involving unobjected-to charge error, a reversal will be proper only "if the error is so egregious and created such harm that [the accused] has not had a fair and impartial trial[.]" *Almanza*, 686 S.W.2d, at 171. Regarding egregious

harm, "[t]he same idea is contained in the occasional statements that a fundamental error must 'go to the very basis of the case,'[] deprive the accused of a 'valuable right,'[] or 'vitally affect his defensive theory.'[] Such a basic framework for analysis is probably all that can be expected of any general definition." *Id.*, at 172.

A finding of jury-charge error "begins—not ends—the inquiry; the next step is to make an evidentiary review." *Id.*, at 174. In making the determination whether egregious harm has occurred, "the actual degree [of harm] must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole." *Id.*

This evidentiary review inquires as to "the nature of the testimony supporting the verdict" and whether that testimony was "cogent and overwhelming," and also the nature of the testimony alleged to be omitted from the jury's consideration and whether it "was reasonably calculated to destroy the State's case when considered in connection with the other testimony in the case, as well as the charge as a whole." *Id.*, at 174. The review then continues, considering "any other part of the record as a whole which may illuminate the actual, not just theoretical, harm to the accused." *Id.* The Court of Criminal Appeals conducted the careful review required by *Almanza* and, as demonstrated in Section III.B.2 *infra*, found that—because there was no egregious harm that denied Smith a fair and impartial trial—the *Penry* error in his sentencing was harmless. *Smith III*, 185 S.W.3d, at 467-72; J.A. 288-98.

2. Under *Almanza*, or indeed any standard of harmless-error review, the *Penry* error in Smith's case was harmless.

In order to determine whether a jury-charge error is harmless, *Almanza*—like the federal equivalent—implicates a quantitative assessment of the evidence in terms of its impact on the trial as a whole. *See Arizona v.*

Fulminante, 499 U.S. 279, 307-08 (1991). With respect to *Penry*-type evidence, three metrics for that assessment present themselves: (1) the quantum of the mitigating evidence, (2) the weight of that evidence, and the (3) degree to which that evidence may be "double-edged." Smith's evidence fares poorly on all three metrics.

(a) Quantum: The jury could fully consider the vast majority of Smith's mitigating evidence, which focused heavily on his positive character traits.

In his trial, Smith presented potential *Penry* mitigating evidence that the Court has characterized as falling into five categories:

> (1) he had been diagnosed with potentially organic learning disabilities and speech handicaps at an early age;
>
> (2) he had a verbal IQ score of 75 and a full score of 78 and, as a result, had been in special education classes throughout most of his time in school;
>
> (3) despite his low IQ and learning disabilities, his behavior at school was often exemplary;
>
> (4) his father was a drug addict who was involved with gang violence and other criminal activities, and regularly stole money from family members to support a drug addiction; and
>
> (5) he was only 19 when he committed the crime. *Smith II*, 543 U.S., at 41.

Of those five categories, two fall squarely outside the ambit of *Penry* evidence: numbers three and five. With respect to number three, "exemplary" behavior has long been held by the Court to be fully encompassed by the pre-1991 Texas special issues (because past exemplary behavior goes directly to disproving future dangerousness).[35] *See*

[35] As the Court observed earlier this Term, "the 'forward-looking' future-dangerousness inquiry 'is not independent of an assessment of

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Jurek, 428 U.S., at 274-76; *Franklin*, 487 U.S., at 177-80. And, with respect to number five, the Court has twice explicitly held that youth, likewise, was fully encompassed by the Texas special issues. *See Graham*, 506 U.S., at 474-76; *Johnson*, 509 U.S., at 367-68.

Indeed, the vast majority of the mitigating evidence introduced by Smith at the punishment phase focused on category three, attempting to demonstrate good character and behavior—all of which, under *Jurek* and *Franklin*, could be given full effect by the jury. In fact, of the twenty witnesses called by the defense at the punishment phase, all but three spent substantial portions of their testimony discussing Smith's character and behavior. *See supra* fn.2.

And, with respect to category number four, Smith's evidence concerning his troubled father, at least a portion of that evidence was also encompassed by the special issues. In *Graham*, the Court held that the pre-1991 Texas special issues allowed the jury to give full effect to Graham's "transient upbringing," and to his "mother's mental illness and repeated hospitalization, and his shifting custody to one family relation or another." 506 U.S., at 476; *id.*, at 520 (Souter, J., dissenting). Although Smith's evidence was not identical, it shared with Graham's an overlapping pattern of parental neglect and instability.[36]

Thus, for purpose of harmless-error analysis, Smith is left with (rearranged for clarity) three categories of mitigating evidence to which the special issues prevented the jury giving full effect:

1) evidence of "potentially organic learning disabilities and speech handicaps" and placement in

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personal culpability.'" *Ayers v. Belmontes*, 127 S.Ct. 469, 475 (2006) (quoting *Johnson*, 509 U.S., at 369).

[36] Moreover, the *Johnson* court held that Texas's special issues only needed to provide the jury a vehicle "to consider *in some manner* all of a defendant's relevant mitigating evidence," and were not required to allow the jury "to give effect to mitigating evidence *in every conceivable manner in which the evidence might be relevant*." *Johnson*, 509 U.S., at 372 (emphasis added).

"special education classes throughout most of his time in school";

2) evidence of relatively low IQ—specifically full score IQ of 78, a verbal IQ score of 75, and a performance IQ of 84; and

3) (to the extent not already covered by *Graham*) evidence that "his father was a drug addict who was involved with gang violence and other criminal activities, and regularly stole money from family members to support a drug addiction." *Smith II*, 543 U.S., at 41; *Smith III*, 185 S.W.3d, at 460; J.A. 280.

There is no disputing, under this Court's precedents, that it was constitutional error for the jury to have been left with only the two special issues to give effect to this evidence, with no sufficient corrective instruction. But, for harmless error purposes, perhaps the best way to measure the quantum of *Penry* mitigating evidence at issue is to examine the degree of importance his counsel placed upon it. In the course of presenting a vigorous defense at sentencing, putting on twenty witnesses and presenting forty pages of closing argument, all of the evidence discussed above comprised only a very small fraction of the total presentation.

The record in Smith's case establishes that the primary focus of the defense's witnesses at the punishment phase was Smith's character. Seventeen of his twenty witnesses testified to things such as the fact that they had never seen him act violently, that he was good with children, and that he could be rehabilitated and did not need to die.

In contrast, only a single Dallas ISD records custodian testified concerning Smith's diagnosis at an early age of possibly organic learning disabilities, relatively low IQ, and educational background involving special education classes. *See supra* fn.5. And the four witnesses who mentioned Smith's father provided very little information beyond a general awareness that he had drug problems and that it had affected Smith in unspecified ways. *See supra* fn.6.

Likewise, Smith's counsel's argument focused nearly entirely on the following points unrelated to his mitigating

evidence of impaired intellectual functioning and difficult childhood:

- General discussion about whether society has progressed to a point where there is an alternative to the death penalty. *See* 33.RR.33-37.
- Discussion of the evidence presented at trial that defense counsel argues suggests Kevin Shaw, not Smith, was the ringleader. *See* 33.RR.38-43.
- Discussion of the meaning of "deliberate" in special issue one and argument that Smith premeditated robbery, but did not premeditate the murder. *See* 33.RR.43-45.
- Discussion of the second special issue and argument that the evidence would show that Smith is not a continuing threat and could be rehabilitated. *See* 33.RR.45-57.
- Discussion of Smith's positive character traits through a review of the testimony of eleven character witnesses. *See* 33.RR.58-65.
- Discussion of the State's burden and the role of the jurors, without addressing mitigating evidence. *See* 33.RR.69-70.

Indeed, in a forty-page transcript, the portion of Smith's counsel's closing argument devoted to the mitigating evidence concerning Smith's IQ, special education, and trouble caused by his father's drug addiction together combine for only approximately *one single page*.[37] *See* 33.RR.57-58.[38]

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[37] Similarly, in Smith's counsel's "Motion to Declare Tex. Code Crim. Proc. Ann. Art. 37.071 Unconstitutional As Applied," which was explicitly predicated on *Penry I*, he made no mention at all of IQ, learning disabilities, or a neglectful father; instead, he focused exclusively on his youth, arguing that the jury could not give youth full mitigating effect. J.A. 7-10. Of course, that argument was squarely rejected by *Graham* and *Johnson*.

[38] The block quote on page 30 of Petitioner's Brief in fact recounts defense counsel's *entire discussion* of this evidence in his closing argument. *See* Pet'r Br., at 30; *see also* 33.RR.57-58.

By defense counsel's own measure, the quantum of *Penry*-related evidence was quite small, meriting less than three percent of his closing argument.

(b) Weight and Double-Edged Effect: Smith's evidence compared to Penry's.

To measure the relative weight of Smith's proffered mitigating evidence, a comparison with the evidence in Penry is instructive. *See Penry I*, 492 U.S., at 307-09. Penry had an IQ of 54; Smith's was 78.[39] Penry had "moderate retardation, which resulted in poor impulse control and an inability to learn from experience," *Penry I*, 492 U.S., at 308; Smith is not retarded, but does have learning disabilities and speech handicaps, *see* 32.RR.23-26. Penry was viciously "beaten over the head with a belt when he was a child" and had brain damage that was probably "organic," but that may have been "caused by beatings and multiple injuries," *Penry I*, 492 U.S., at 308-09; Smith had a troubled father who neglected him and whose addictions deprived Smith of material possessions, *see* 32.RR.89-91.

There is no evidence that Smith suffered any physical abuse, much less the horrific beatings that had been inflicted on Penry. There is no indication of mental retardation with Smith, simply evidence of below-average intelligence.[40] And, critically, there is no evidence that Smith has "poor impulse control and an inability to learn from experience."

It was this latter aspect that led the Court to describe Penry's "mental retardation and history of abuse [as] a two-edged sword." 492 U.S., at 324. Because he could not

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[39] The State presented evidence at his trial of another IQ test where Smith's IQ was estimated to be 88. 2 J.A. 138, 145.

[40] Indeed, two witnesses who knew Smith well testified that they perceive him to have average or even *above average intelligence*, *see* 32.RR.74; J.A. 97 (Kristi Goffney); 32.RR.78; J.A. 99 (Meg Goffney), and one witness spoke of Smith's genuine desire to learn, 32.RR.95-101 (Charlotte Thompson). No such evidence was presented in Penry's case.

control his impulses or learn from his mistakes, this evidence was relevant to the second special issue "only as an *aggravating* factor." *Id.*, at 323. In contrast, Smith has no such evidence that can be given effect only as an aggravator. Although, under *Tennard*, Smith's evidence was surely relevant, it was not the sort of "two-edged" evidence that raised the most serious concerns in *Penry*.

By any measure, the *Penry* error in this case was harmless, and *a fortiori*, was not egregious error. There was meager evidence, of limited severity, and defense counsel devoted almost no time to the issue (less than 3 percent of his closing). If this quantum is enough to demonstrate harm, then for all intents and purposes *Penry* error will effectively be structural error. For any defendant who clears the hurdle of demonstrating some *Penry* error will almost by definition have at least as much mitigating evidence as Smith. If having a neglectful father and below-average intelligence—with no abuse, with no retardation, with no inability to learn—is by itself enough to trigger automatic reversal, then very few murderers will be unable to avail themselves of that standard.

IV. *PENRY* ERROR IS NOT STRUCTURAL ERROR EXEMPT FROM HARMLESS-ERROR ANALYSIS.

Because Smith's argument that the state court defied this Court's mandate and improperly "revisited" its prior conclusions has no merit, he is left with only one substantive claim before this Court: that the U.S. Constitution forbids the application of state harmless-error doctrine to his case. That claim, in turn, embodies two possible subclaims: (1) that *Penry* claims are structural errors, never subject to harmless-error analysis, or (2) that although *Penry* claims are amenable to harmless-error analysis generally, the particular harmless-error analysis undertaken by the Court of Criminal Appeals was itself unconstitutional. Neither argument is valid.

Penry error is not structural error. No doubt recognizing the weakness of the argument to the contrary, Petitioner devotes but one footnote of his brief to the argument

that it is. *See* Pet'r Br., at 35 n.12.[41] Under this Court's precedents, *Penry*-error is "trial error," subject to a harm analysis because it "occurred during the presentation of the case to the jury, and . . . may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." *Fulminante*, 499 U.S., at 307-08. The Court has held "most constitutional errors can be harmless." *Id.*, at 306; *see also United States v. Gonzalez-Lopez*, 126 S.Ct. 2557, 2564 (2006). And, as the Court explained in *Neder v. United States*, "'[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.'" 527 U.S. 1, 8 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)).

Consistent with this principle, most jury charge errors have been held to be trial errors subject to harmless-error analysis. *See Washington v. Recuenco*, 126 S.Ct. 2546 (2006) (failure to submit sentencing factor to jury); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam) (instruction omitted an element of offense); *Neder* (instruction omitted an element of offense); *Calderon v. Coleman*, 525 U.S. 141 (1998) (misleading jury instruction); *Clemons v. Mississippi*, 494 U.S. 738, 752-54 (1990) (improper sentencing instruction); *Carella v. California*, 491 U.S. 263, 266 (1989) (erroneous conclusive presumption in jury instruction); *Pope v. Illinois*, 481 U.S. 497, 501-04 (1987) (jury instruction

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[41] Although the footnote purports to preserve the argument that *Penry* error is structural error, the accompanying text of the brief *explicitly concedes* that harmless-error analysis is appropriate for *Penry* claims. *See* Pet'r Br., at 35 ("So, for example, if LaRoyce's sole evidence had been that he had average intelligence but had failed a class in third grade, a court might justifiably conclude that such evidence, though outside the jury's effective reach, was *so insubstantial in its mitigating force and so unlikely to add significantly to the case for future dangerousness that it would not likely have affected the jury's ultimate judgment*." (emphasis added)). Thus, Petitioner agrees that harmless error analysis applies, and simply disagrees as to the appropriate evidentiary quantum and weight that qualifies as harmless.

contained wrong constitutional standard); *Rose* (instruction improperly shifted burden of proof on element of crime); *but see Nelson*, 2006 WL 3592953, at *27 (Fifth Circuit concludes that *Penry* error is structural error).

The Court's decisions which *Penry I* interpreted and applied also indicate that such error is trial error. In *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987), for example, the Court found constitutional charge error under *Lockett* and *Eddings*, but expressly observed that the "[r]espondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge." Accordingly, the Court concluded that "[i]n the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid."

Indeed, in a highly analogous context, the Court has expressly held that harmless-error analysis is proper. In *Stringer v. Black*, the Court held that for a capital sentencing scheme that requires the jury to weigh specified aggravating factors against the mitigating evidence, when the weighing process is skewed by an invalid factor "*only constitutional harmless-error analysis or reweighing at the trial or appellate level* suffices to guarantee that the defendant received an individualized sentence." 503 U.S. 222, 232 (1992) (emphasis added). This error, categorically giving too much weight to aggravating factors, is the mirror image of *Penry* error, which occurs when the jury is not able to give the mitigating evidence adequate consideration or effect.

Structural defects, on the other hand, are different and exceedingly rare because, with those errors, "[t]he entire conduct of the trial from beginning to end is . . . affected." *Id.* at 309-10 (1991). Structural defects "'defy analysis by "harmless-error" standards' because they "affec[t] the framework within which the trial proceeds," and are not 'simply an error in the trial process itself.'" *Gonzalez-Lopez*, 126 S.Ct., at 2564 (quoting *Fulminante*, 499 U.S., at 309-10)) (alterations in original). Thus, structural defects include (1) denial of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), (2) erroneous denial of the defendant's

counsel of choice, *Gonzalez-Lopez*, 126 S.Ct. at 2564; (3) denial of self-representation, *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 & n.8 (1984); (4) denial of a public trial, *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984); and (5) denial of trial by jury due to a defective reasonable-doubt instruction, *Sullivan v. Louisiana*, 508 U.S. 275 (1993). In contrast to these sorts of broad errors that affect framework of the trial itself, jury charge errors are almost always trial errors. As the Court concluded in another charge error case:

> Placed in context, the erroneous . . . instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction . . . [because] the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced [the defendant] thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. Consequently, there is no inherent difficulty in evaluating whether the error prejudiced respondent in this case. *Rose v. Clark*, 478 U.S., at 579-80 & n.7 (1986) (citations omitted).

Furthermore, the Court has been exceedingly clear when it concluded constitutional error was structural.[42] In contrast, the Court has made no such statements or even suggestions with respect to *Penry* error despite its numerous opportunities to do so.[43] For good reason: because

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[42] *See, e.g.*, *Gonzalez-Lopez*, 126 S.Ct., at 2564 ("[E]rroneous deprivation of the right to counsel of choice, . . . qualifies as 'structural error.' "); *Sullivan*, 508 U.S., at 281-82 (holding that the denial of a trial by jury due to a defective reasonable doubt instruction "unquestionably qualifies as 'structural error' "); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review.").

[43] Given the Court's jurisprudence suggesting the contrary, and the Court's prior silence on this specific issue, the Court could not create and apply a new rule in this case that *Penry* error is structural error because such a holding would run afoul of the Court's *Teague* doctrine.

Penry error, like all other trial errors, does not require automatic reversal and is subject to harmless-error review.

V. THE TEXAS COURT OF CRIMINAL APPEALS'S APPLICATION OF *ALMANZA* WAS AN ADEQUATE AND INDEPENDENT STATE GROUND OF DECISION.

The Court of Criminal Appeals's application of its longstanding harmless-error standard provides an adequate and independent state ground for its decision. The Court has consistently held that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *see also Wainwright v. Sykes*, 433 U.S. 72, 81 (1977); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). Unlike in the federal habeas context, where the adequate and independent state ground doctrine is "grounded in concerns of comity and federalism," when the Court directly reviews state court judgments, the "adequate and independent" rule is jurisdictional. *Coleman*, 501 U.S., at 729-30.[44]

A. The Texas Court of Criminal Appeals's Decision On Remand Was Based On an Adequate and Independent State Ground.

In order to be considered "adequate" to support a state court's judgment, a state procedural ground must (1) be

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[44] Just as in cases arising on direct review, this doctrine also applies to review of a state court's denial of state habeas relief. *See Williams v. Kaiser*, 323 U.S. 471, 477 (1945). For example, just last Term the Court upheld the Virginia Supreme Court's denial of habeas relief due to a procedural default based on the petitioner's failure to assert his rights under the Vienna Convention at trial or on direct appeal. *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2006). In doing so, the Court observed that "[n]ormally, in our review of state-court judgments, such [state procedural] rules constitute an adequate and independent state-law ground preventing us from reviewing the federal claim." *Id.*, at 2682.

based on "firmly established and regularly followed state practice," and (2) further a legitimate state interest. *James v. Kentucky*, 466 U.S. 341, 348-49 (1984). State procedural grounds that the Court has deemed "inadequate" typically fall into one of four categories:[45] those that (1) are "not strictly or regularly followed,"[46] (2) are novel,[47] (3) are discretionary,[48] or (4) unjustifiably burden federal rights.[49]

A state court decision is "independent" when the state law ground for the decision is sufficient to support the judgment. *Coleman*, 501 U.S., at 729. In such a case the Court lacks jurisdiction because "resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id.*

The Court of Criminal Appeals's application of *Almanza* was "adequate" because it has been the firmly established and regularly followed precedent in Texas for over twenty years in determining whether jury-charge error requires reversal, *see supra* Section II, and because it furthers a legitimate state interest in the finality of convictions and sentences imposed by Texas juries. And it was "independent" because the state ground of decision was sufficient to support the judgment. The court's decision was based entirely on questions of Texas state procedure, specifically whether Smith preserved his objection to the jury charge and whether the already-recognized constitutional defect required resentencing under Texas's applicable "egregious harm" standard. *See supra* Section III.

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[45] *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. LAW REV. 1128, 1137-45 (1986).

[46] *See, e.g., Barr v. Columbia*, 378 U.S. 146, 149 (1964); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982).

[47] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); *see also Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

[48] *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 234 (1969).

[49] *See, e.g., Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *Douglas v. Alabama*, 380 U.S. 415, 422 (1965).

B. The Case Law Relied Upon By Smith and His *Amicus* Does Not Support the Argument That The Court of Criminal Appeals's Decision Was Not "Adequate" or "Independent."

Smith and his *amicus*'s argument that the Court of Criminal Appeals's decision was not based on an adequate state-law ground turns on two assertions: (1) that the record shows Smith did in fact preserve his claim; and (2) that the court improperly engaged in a "procedural default" analysis on remand after it had already ruled on Smith's claim on the merits. *See generally* Pet'r Br., at 40-50; Amicus Br., at 14-26. As exhaustively demonstrated in Sections II and III, *supra*, both contentions are false.[50]

For example, Smith's *amicus*'s reliance on *Douglas v. Alabama*, 380 U.S. 415 (1965), *see* Amicus Br., at 16, is misplaced because in that case the state court ruled that the defendant waived his right to confrontation by failing to sufficiently object to the reading of an alleged confession—after, the record showed, the lawyer had already objected three times to the reading, and then moved that the evidence be excluded and moved for a mistrial based on the alleged error. *Id.*, at 420-23. The trial court overruled him every time, and it was "clear" to the Court that any further objections would have been futile, and possibly damaging to his reputation with the jury. *Id.*, at 422-23. But Smith's counsel—unlike the attorney in *Douglas*—failed to make any objection at all to the content of the trial court's supplemental instruction, despite an express invitation to do so. *See* J.A. 20-21; *see also* J.A. 7-16.

Likewise, Smith's situation is markedly different in kind from that presented in *Staub v. City of Baxley*, 355 U.S. 313 (1958), where the Court held that the State's procedural rule that defaulted the appellant's claim was

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[50] And the cases Petitioner cites to attack the adequacy and independence of the application of *Almanza* on state habeas are all inapposite. *See supra* Section II.B.

"an arid ritual of meaningless form." *Id.*[51] Here, Smith deprived the trial court and the State of any opportunity at trial to correct the problems he now raises with the supplemental instruction because he argued that no instruction could be given at all. J.A. 7-16. And by any measure it is not an "arbitrary rule" to require a defendant to make a specific objection at trial that allows correction of the charge error in a timely manner.

Nor does *Ford v. Georgia*[52] aid Petitioner. In *Ford*, the Georgia Supreme Court, on remand from this Court following *Batson v. Kentucky*, 476 U.S. 79 (1986), procedurally defaulted petitioner's claims based on a rule it announced years *after* the petitioner could have complied with it. As the Court explained, "[t]o apply [the procedural rule] retroactively . . . would . . . apply a rule unannounced at the time of petitioner's trial and consequently [is] inadequate to serve as an independent state ground. . . ." *Ford*, 498 U.S., at 424. Of course, the Texas rule that jury charge error should be timely and specifically raised at trial was hardly "unannounced" at the time of Smith's trial.[53]

Also inapposite are the *NAACP v. Alabama ex rel Patterson*,[54] cases relied upon by Smith and his *amicus*. *See* Pet'r Br., at 49; Amicus Br., at 13, 21. Those cases stand for the principles that: (1) "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their

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[51] The *Staub* petitioner had challenged all sections of an ordinance because they were "interdependent in their application to one in appellant's position," *Staub*, 355 U.S., at 320, and the state court procedurally defaulted the petitioner's constitutional claim because she failed to list every section that she claimed was unconstitutional, *id.*

[52] 479 U.S. 1075 (1987) and 498 U.S. 411 (1991).

[53] Article 36.19 of the Texas Code of Criminal Procedure, extant at the time of Smith's trial, required—*inter alia*—that "[a]ll objections to the charge and to the refusal of special charges shall be made at the time of the trial." TEX. CODE CRIM. PROC. art. 36.19.

[54] 357 U.S. 449, 467 (1958) and 360 U.S. 240, 244-45 (1960).

federal constitutional rights." *NAACP*, 357 U.S., at 457-58; and (2) a lower court may not reexamine on remand the grounds of this Court's decision. The Court of Criminal Appeals's decision violated neither of these principles.

First, neither the necessity of timely objection to charge error at trial, nor the application of *Almanza* to determine whether charge error was harmful, were "novel" concepts under Texas law. *See supra* Sections II and III. But perhaps even more important, the Court of Criminal Appeals's analysis and decision on remand were driven by its acknowledgment that this Court had reversed its decision and found constitutional error in Smith's charge and, in order to comply with that decision, the court reviewed whether the recognized constitutional charge defect had caused sufficient harm to require resentencing. *See Smith III*, 185 S.W.3d at 467-72; J.A. 288-98.[55]

Attacking the independence of the state ground, Smith's *amicus* primarily compares the Court of Criminal Appeals's decision with that considered in *Ake v. Oklahoma*, 470 U.S. 68 (1985). *See* Amicus Br., at 14, 22. But *Ake* is not on point. *Ake* involved a state court's application of a procedural bar, specifically a waiver rule, that did not apply to fundamental trial error, which the state court had declared included federal constitutional errors. *Id.*; at 74-75. Thus, the Court concluded in *Ake* that "the State has made

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[55] The *Yates* cases cited by Smith and his *amicus*, Pet'r Br., at 43 and Amicus Br., at 20 n.12, are also inapplicable here. First, unlike *Yates*, a pre-*Brecht* case in which the state court failed to apply the *Chapman* harmless-error standard and misconstrued the record, *Yates v. Evatt*, 500 U.S. 391, 400 (1991) (*Yates III*), in Smith's case, application of *Chapman* was not necessary and the Court of Criminal Appeals applied its well-established harmless-error test for the type of error at issue. Second, unlike *Yates*, in which the state court concluded that there was constitutional error but denied relief based on a non-retroactivity rule, 500 U.S., at 398-399, the Court of Criminal Appeals in Smith's case denied relief because it concluded that there was no constitutional error. *Smith I*, 132 S.W.3d, at 417. When the Court corrected this conclusion, the Court of Criminal Appeals analyzed the entire record for harm from this error. *Smith III*, 185 S.W.3d, at 467-72.

application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." *Id.* Because the state court's decision in *Ake* necessarily involved a ruling on federal law, it was not derived from an "independent" state ground. *Id.*

In Smith's case—unlike *Ake*—the Court of Criminal Appeals's harmless-error analysis turned only on questions governed by Texas state law standards: (1) whether Smith had properly objected to the error at trial; and (2) whether the error had caused Smith "egregious harm" under the *Almanza* standard. Thus, *Ake* provides no support for Smith's argument that the Court of Criminal Appeals's decision did not rest on an independent state law ground.

Finally, Smith's *amicus*'s reliance on *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), is also misplaced. *See* Pet'r Br., at 10, 13-14, 22. In *Harper*, the Court rejected the state court's application of a state non-retroactivity rule to the Court's interpretations of federal constitutional law. *Id.*, at 100. The Court held that a State could not refuse to apply a rule of federal constitutional law retroactively if the Court said as a matter of federal law that the rule applied retroactively. *Id.* Unlike in *Harper*, the starting point of the Court of Criminal Appeals's analysis on remand was that constitutional error existed in Smith's charge. The only question decided on remand was whether that error was harmful and required resentencing—questions that turned on Texas law.

Because the Court of Criminal Appeals's decision on remand concerned only questions of Texas law, specifically whether Smith's charge error was preserved and whether that error was harmless,[56] the decision rests on adequate and independent state grounds that are not appropriate for this Court's review.

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[56] *See Smith III*, 185 S.W.3d, at 467-72; J.A. 288-98.

CONCLUSION

Because the state habeas ruling rests on an adequate and independent state ground, the writ of certiorari should be dismissed for want of jurisdiction. Alternatively, the Court should affirm the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

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December 2006

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August 16, 2004

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VIA FACSIMILE – (512) 320-8132

Ed Marshall, Assistant Attorney General
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Austin, TX 78711

Re: *LaRoyce Smith v. Doug Dretke*; Civil Action No. 3:04-CV-1576-D; pending In the United States District Court for the Northern District of Texas, Dallas Division

STIPULATION

(Filed Sep. 20, 2004)

Dear Mr. Marshall:

Background

On August 10, 1999, Mr. LaRoyce Smith ("Petitioner") and the State of Texas ("Respondent") entered into a joint stipulated dismissal, filed among the papers of the U.S. District Court for the Northern District of Texas, Dallas Division in the matter styled: *LaRoyce Smith v. Gary Johnson*, No. 3:98-CV-1778-G. In this Joint Stipulated Dismissal, Petitioner and Respondent agreed that "if and when Mr. Smith returns to . . . federal court, Respondent shall not raise the statute of limitations defense, and will further not assert that Mr. Smith is subject to the successor provisions of 28 U.S.C. § 2244."

On May 12, 2004, Petitioner and Respondent agreed that at the conclusion of the state habeas proceedings, Petitioner would file his federal petition for habeas corpus relief ("federal petition") on or before September 1, 2004 and that Respondent would not raise the statute of limitations defense or assert that Mr. Smith is subject to the successor provisions of 28 U.S.C. § 2244. This agreement was memorialized by my May 12, 2004 letter to you.

On July 19, 2004, following the conclusion of the habeas proceedings in state court, the Petitioner filed a petition for a writ of certiorari in *Smith v. Texas*, No. 04-5323 (U.S. July 19, 2004).

On July 20, 2004, Petitioner filed a motion to proceed *in forma pauperis* and for appointment of counsel, which was assigned to and granted by Judge Fitzwater on July 23, 2004 in *LaRoyce Lathair Smith v. Doug Drekte*, No. 3:04-CV-1576-D. On August 2, 2004, the Respondent filed its Notice of Appearance of Counsel.

Because *Smith v. Texas*, No. 04-5323 (U.S. July 19, 2004) was pending in the Supreme Court, Judge Fitzwater's July 23, 2004 order recited that "[i]f the Supreme Court grants the petition, the parties are excused from complying with this order," but if certiorari is denied, then Petitioner must file a fully supported petition for writ of habeas corpus "[n]o later than 90 days after the Supreme Court denies petitioner's pending petition for a writ of certiorari and motion for leave to proceed in forma pauperis. . . . " Judge Fitzwater also ordered the clerk of court "to close [the case] statistically until the court directs that it be reopened," which in turn hinges on the outcome in the Supreme Court.

If Certiorari is Denied

This letter serves to confirm our stipulation whereby Petitioner and Respondent hereby modify their prior agreements as set forth herein. If the Supreme Court denies certiorari in Smith v. Texas, No. 04-5323 (U.S. July 19, 2004), Respondent agrees that Respondent will not raise the statute of limitations defense, nor contend that Petitioner is subject to the successor provisions of 28 U.S.C. § 2244, so long as Petitioner files his federal petition in accordance with Judge Fitzwater's July 23, 2004 Order, together with any further extension(s) of the filing deadline(s) granted by Judge Fitzwater.

If Certiorari is Granted

On the other hand, if the Supreme Court in Smith v. Texas, No. 04-5323 (U.S. July 19, 2004) grants the petition, and pursuant to Judge Fitzwater's order, the parties are excused from complying with this order, and Mr. Smith's case is remanded to state court, this letter serves to confirm our stipulation whereby Petitioner and Respondent agree that if and when Mr. Smith returns to federal court, Respondent shall not raise the statute of limitations defense, and will further not assert that Mr. Smith is subject to the successor provisions of 28 U.S.C. § 2244, provided Mr. Smith files a motion for appointment of counsel with the federal court within 45 days of the denial of relief in the state court, and files his federal habeas petition within 90 days of the appointment of counsel.

Please sign in the space provided below memorializing our stipulation and return it to me via facsimile. We will then file a copy of our stipulation with the Court. In

the event this letter does not accurately memorialize our agreement, please call me as soon as possible so we may revise the wording as necessary.

Thank you for your courtesy and cooperation in this matter.

Sincerely,

/s/ Craig A. Harris
Craig A. Harris

AGREED TO:

/s/ Ed Marshall
Ed Marshall, Assistant
Attorney General
Office of the Attorney General
Capital Litigation Division

CAH/lll

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March 28, 2006

The Honorable Sidney Fitzwater
United States District Court Judge
Northern District of Texas, Dallas Division
1100 Commerce Street
Dallas, TX 75242-1003

Re: *Laroyce Smith v. Doug Dretke*, No. 3:04-CV-1576

Re: Texas Court of Criminal Appeals Opinion
Following the Supreme Court decision
reversing and remanding

Dear Judge Fitzwater:

In our November 17, 2004 letter to you, we agreed that the parties would notify you once the decision of the Texas Court of Criminal Appeals was rendered, as well as the decision of the parties as to how they wish to proceed in the federal habeas proceeding.

This letter is to advise you that the Texas Court of Criminal Appeals rendered the attached published opinion on March 1, 2006, *Ex parte Smith*, ___ S.W.3d ___, 2006 WL 475313, *12 (Tex. Crim. App. 2006) denying relief following remand from the U.S. Supreme Court.

Accordingly, this letter is also to advise you that at present counsel for both parties are attempting to stipulate as to how they wish to proceed in view of the fact Mr. Smith will be filing another petition of writ of certiorari with the U.S. Supreme Court, which, in the interest of judicial economy, could obviate the need to file a petition in federal

court within 90 days. It is anticipated that a joint stipulation will be filed with the Court shortly or, if one can not be agreed to, then the parties will so advise the court.

Nothing in this letter constitutes a waiver of Mr. Smith's rights to vigorously pursue his guilt/innocence claims in federal court even if the Texas Court of Criminal Appeals remands the case for re-sentencing.

Thank you for your consideration of this matter.

Very truly yours,

/s/ Lydia M.V. Brandt
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Enclosure: *Ex parte Smith*, ___ S.W.3d ___, 2006 WL 475313, *12 (Tex. Crim. App. 2006)

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Re: *LaRoyce Smith v. Doug Dretke*; Civil Action No. 3:04-CV-1576-D; pending In the United States District Court for the Northern District of Texas, Dallas Division

STIPULATION

(Filed Mar. 29, 2006)

Dear Mr. Marshall:

Background

On August 10, 1999, Mr. LaRoyce Smith ("Petitioner") and the State of Texas ("Respondent") entered into a joint stipulated dismissal, filed among the papers of the U.S. District Court for the Northern District of Texas, Dallas Division in the matter styled: *LaRoyce Smith v. Gary Johnson*, No. 3:98-CV-1778-G. In this Joint Stipulated Dismissal, Petitioner and Respondent agreed that "if and when Mr. Smith returns to . . . federal court, Respondent shall not raise the statute of limitations defense, and will further not assert that Mr. Smith is subject to the successor provisions of 28 U.S.C. § 2244."

On May 12, 2004, shortly after the Texas Court of Criminal Appeals denied relief on Petitioner's Petition for a Writ of Habeas Corpus, Petitioner and Respondent further agreed that after the resolution of the petition for a writ of certiorari to the Texas Court of Criminal Appeals denial, Petitioner would file his federal petition for habeas corpus relief ("federal petition") on or before September 1, 2004 and that Respondent would not raise the statute of limitations defense or assert that Mr. Smith is subject to the successor provisions of 28 U.S.C. § 2244. This agreement was memorialized by my May 12, 2004 letter to you.

On July 19, 2004, Petitioner filed a petition for a writ of certiorari in *Smith v. Texas*, No. 04-5323 (U.S. July 19, 2004).

On July 20, 2004, Petitioner filed in the District Court for the Northern District, Dallas Division, a motion to proceed *in forma pauperis* and for appointment of counsel, which was assigned to and granted by Judge Fitzwater on July 23, 2004 in *LaRoyce Lathair Smith v. Doug Dretke*, No. 3:04-CV-1576-D. On August 2, 2004, the Respondent filed its Notice of Appearance of Counsel.

Because *Smith v. Texas*, No. 04-5323 (U.S. July 19, 2004), was pending in the United States Supreme Court, Judge Fitzwater's July 23, 2004 order recited that "[i]f the Supreme Court grants the petition, the parties are excused from complying with this order," but if certiorari is denied, then Petitioner must file a fully supported petition for writ of habeas corpus "[n]o later than 90 days after the Supreme Court denies petitioner's pending petition for a writ of certiorari and motion for leave to proceed in forma pauperis. . . . " Judge Fitzwater also ordered the clerk of court "to close [the case] statistically until the court directs

that it be reopened," which in turn hinges on the outcome in the Supreme Court.

The United States Supreme Court granted Mr. Smith's petition for a writ of certiorari, granted relief, and remanded the case to the Texas Court of Criminal Appeals ("CCA") for further consideration in light of the Supreme Court's opinion. On March 1, 2006, the Texas Court of Criminal Appeals issued its opinion affirming Mr. Smith's death sentence despite the US Supreme Court order granting relief. Thus, Mr. Smith will again file a petition for writ of certiorari with the United States Supreme Court. The petition will be filed on or before May 31, 2006.

If Certiorari is Denied

This letter serves to confirm our stipulation whereby Petitioner and Respondent hereby modify their prior agreements as set forth herein. If the United States Supreme Court denies certiorari on the petition for writ of certiorari Mr. Smith will file on or before May 31, 2006, based on the CCA's March 1, 2006 opinion, Respondent agrees that Respondent will not raise the statute of limitations defense, nor contend that Petitioner is subject to the successor provisions of 28 U.S.C. § 2244, so long as Petitioner thereafter files his federal habeas petition within 90 days of the United States Supreme Court's denial of this petition for writ of certiorari.

If Certiorari is Granted

On the other hand, if the United States Supreme Court grants the petition for writ of certiorari, and Mr. Smith's case is remanded to state court, this letter serves

to confirm our stipulation whereby Petitioner and Respondent agree that if and when Mr. Smith subsequently returns to federal court after the state proceedings are exhausted, if necessary, Respondent shall not raise the statute of limitations defense, and will further not assert that Mr. Smith is subject to the successor provisions of 28 U.S.C. § 2244, provided Mr. Smith thereafter files his federal habeas petition within 90 days of the ultimate resolution of the cert petition by the United States Supreme Court, including any further related state court proceedings.

Please sign in the space provided below memorializing our stipulation and return it to me via facsimile. We will then file a copy of our stipulation with the Court. In the event this letter does not accurately memorialize our agreement, please call me as soon as possible so we may revise the wording as necessary.

Thank you for your courtesy and cooperation in this matter.

Sincerely,

/s/ Craig A. Harris
Craig A. Harris

AGREED TO:

/s/ Ed Marshall
Ed Marshall, Assistant Attorney General
Office of the Attorney General
Capital Litigation Division

CAH/kpm

cc: Lydia Brandt, Esq.

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No. 05-11304

IN THE
SUPREME COURT OF THE UNITED STATES

LAROYCE LATHAIR SMITH,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

RESPONDENT'S MOTION TO SUPPLEMENT BRIEF IN OPPOSITION AND SUPPLEMENTAL BRIEF IN OPPOSITION

SUPPLEMENTAL

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To the Honorable Justices of the Supreme Court of the United States:

RESPONDENT'S MOTION TO SUPPLEMENT

This certiorari proceeding arises from a state habeas corpus appeal brought by Petitioner LaRoyce Lathair Smith. On September 5, 2006, the State timely filed its Brief in Opposition. On that day, briefs were also filed by two amici curiae in support of Smith's petition.[1] Smith subsequently used material in the amicus briefs to file a Reply Brief on September 13, 2006. Smith's Reply Brief also discussed, for the first time, a federal case issued in March of 2006. The State moves for leave to supplement its Brief in Opposition in order to discuss the new case law presented by Smith and amici.

SUPPLEMENTAL BRIEF

Smith and amici's portrayal of the Texas Court of Criminal Appeals' (CCA) *Penry* jurisprudence is disingenuous. Smith and amici may not rely on a body of case law developed by the CCA between 1989 and 2004 to condemn the CCA's opinion in this case as "inconsistent" in its application of a harm analysis. Significant changes occurred in Texas's *Penry* jurisprudence when this Court issued *Penry II* in 2001 and *Tennard* in 2004, rendering the CCA's former analysis of *Penry* error obsolete. Moreover, Smith also misrepresents the law in Texas regarding jury charge error. Generally speaking, claims of charge error and *Penry* error in particular are not defaulted by the failure to object at trial. The CCA's failure to discuss procedural default in this case, either before or after

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[1] Amicus briefs were filed on behalf of the Constitution Project, an anti-death penalty group, and four former federal appellate judges.

remand, is therefore not equivalent to a rejection of a procedural default argument by the CCA.

ARGUMENT

I. Smith agrees that the error in this case is subject to harmless error review.

In his reply brief, Smith concedes that the appropriate inquiry on remand was an assessment of the record for harm. Reply Brief, p. 2. Neither Smith nor amici contend that the jury charge error in this case was structural error or somehow immune from a harmless error analysis. Thus, all the parties concur that the charge error in this case is subject to a harm analysis. This consensus on the law is easily confirmed by the prior opinions of this Court.

In *Mitchell v. Esparza,* this Court held that jury charge error can be subject to a harmless error review, even in death penalty cases. *See Mitchell v. Esparza*, 540 U.S. 12, 16-17 (2003) (per curiam) (holding that the failure to instruct the jury on all the statutory elements of the offense is subject to harmless error review). Moreover, it is the general custom of this Court to leave it to the state courts on remand to consider whether an error is, in fact, harmless. *Lilly v. Virginia*, 527 U.S. 116, 139-40 (1999) (noting on remand that the Supreme Court leaves it to the state court to consider in the first instance whether Sixth Amendment error was harmless under *Chapman*); *see also Calderon v. Coleman*, 525 U.S. 141, 146-47 (1998) (holding that federal court could not grant habeas relief upon a finding of *Penry*-like charge error without conducting harm inquiry under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). Thus, the CCA's performance of a harm analysis

on remand, after a finding of error by this Court, accords with the usual practice before this Court and is not an "underhanded," "tactical maneuver" devised to avoid this Court's decision on the merits, as Smith and amici incorrectly claim.

II. Smith and amici misrepresent the CCA's *Penry* jurisprudence between 1989 and 2004

It is undeniable that a harmless error review on remand is both encouraged and proper under the foregoing law. Thus, the only recourse for Smith and amici is to persuade this Court that the analysis conducted by the CCA on remand was not a harmless error analysis but something else. To do so, counsel for Smith and amici allege that the CCA created an ad hoc procedural bar in the guise of a harmless error analysis never before implemented for *Penry* error. Smith's Reply Brief, p. 13; Appellate Judges' Amicus Brief, p. 9-10; Constitution Project Amicus Brief, p. 15.

In fact, the CCA has never hesitated to apply the *Almanza* egregious harm analysis, in the absence of a trial objection, to all types of charge error in death penalty cases.[2] *See Almanza v. State*, 686 S.W.2d 157, 171-72 (Tex. Crim. App. 1984) (op. on

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[2] *See, e.g., Scheanette v. State*, 144 S.W.3d 503, 507-08 (Tex. Crim. App. 2004) (concluding that improper wording of mitigation special issue would require showing of egregious harm under *Almanza*); *Herron v. State*, 86 S.W.3d 621, 631-34 (Tex. Crim. App. 2002) (analyzing failure to give accomplice-witness instruction under *Almanza* egregious harm standard); *Ortiz v. State*, 93 S.W.3d 79, 90-92 (Tex. Crim. App. 2002) (analyzing trial court's reliance on wrong statute under *Almanza* egregious harm analysis); *Feldman v. State*, 71 S.W.3d 738, 756-57 (Tex. Crim. App. 2002) (concluding erroneous parole charge instruction did not cause egregious harm under *Almanza*); *Ovalle v. State*, 13 S.W.3d 774, 785-88 (Tex. Crim. App. 2000) (analyzing incomplete punishment charge for egregious harm under *Almanza*); *Medina v. State*, 7 S.W.3d 633, 638 (Tex. Crim. App. 1999) (finding no egregious harm under *Almanza* for improper instruction on transferred intent); *Cathey v. State*, 992 S.W.2d 460, 465-66 (Tex. Crim. App. 1999) (concluding defendant did not suffer egregious harm under *Almanza* from parties charge); *Green v. State*, 934 S.W.2d 92, 107-08 (Tex. Crim. App. 1996) (finding no egregious harm from "extra-statutory" charge on burden of proof).

reh'g) (establishing different harmless error reviews for objected-to and unobjected-to charge error). Despite the CCA's extensive history of applying the *Almanza* egregious harm analysis to a variety of unpreserved charge errors in death penalty cases, Smith and amici contend that the CCA has--for reasons unexplained--singled out *Penry* error, and declined to apply a harm analysis until it allegedly used it in this case to thwart this Court's intent on remand. Opposing counsel and amicus both cite the same string of Texas cases purportedly showing that the *Almanza* egregious harm standard has never before been applied in the analysis of a "*Penry*" claim, either to grant or deny relief. Smith's Reply Brief, p. 13; Appellate Judges' Amicus Brief, p. 9. Amicus then draws the "inescapable" conclusion that the CCA applied a harm analysis in this case "solely to avoid compliance with this Court's mandate and prevent further review by this Court." Appellate Judges' Amicus Brief, p. 9; *see also* Smith's Reply Brief, p. 15.

This "inescapable" conclusion is wrong. All of the cases cited by opposing counsel and amicus were decided before this Court issued its opinions in *Penry II* and *Tennard v. Dretke* .[3] *Tennard v. Dretke*, 542 U.S. 274 (2004); *Penry v. Johnson*, 532 U.S.

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[3] Opposing counsels cite the following reversals: *Ramirez v. State*, 815 S.W.2d 636 (Tex. Crim. App. 1991); *Ex parte Goodman*, 816 S.W.2d 383 (Tex. Crim. App.1991); *Ex parte McGee*, 817 S.W.2d 77 (Tex. Crim. App. 1991); *Ex parte Williams*, 833 S.W.2d 150 (Tex. Crim. App. 1992); *Rios v. State*, 846 S.W.2d 310 (Tex. Crim. App. 1992).

Opposing counsels cite the following affirmances: *Fuller (Tyrone) v. State*, 827 S.W.2d 919 (Tex. Crim. App. 1992); *Fuller (Aaron) v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992); *San Miguel v. State*, 864 S.W.2d 493 (Tex. Crim. App. 1993); *Robertson v. State*, 871 S.W.2d 701 (Tex. Crim. App. 1993); *Wheatfall v. State*, 882 S.W.2d 829 (Tex. Crim. App. 1994); *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995); *Mason v. State*, 905 S.W.2d 570 (Tex. Crim. App. 1995); *Heiselbetz v. State*, 906 S.W.2d 500 (Tex. Crim. App. 1995); *Goff v. State*, 931 S.W.2d 537 (Tex. Crim. App. 1996).

782 (2001) (*Penry II*). Opposing counsels fail to acknowledge that the errors committed by the CCA in this case *did not even exist until the opinions in Penry II and Tennard issued in 2001 and 2004,* respectively. This distinction is critical because it explains why the CCA's former case law contains no harmless error reviews.

Under the now-disavowed Fifth Circuit "screening test," the CCA's former analysis of *Penry I* claims contained a type of built-in harmless error analysis. Following the lead of the Fifth Circuit, the CCA did not find "error" under *Penry I* unless there was evidence that the defendant's crime was attributable to a uniquely severe, permanent handicap, not of his own making. *See Robertson v. Cockrell*, 325 F.3d 243, 251 (5th Cir. 2003) (overruled in part by *Tennard*); *e.g.*, *Mines v. State*, 852 S.W.2d 941, 951 (Tex. Crim. App. 1992) (citing *Lackey v. State*, 819 S.W.2d 111, 135, n.10 (Tex. Crim. App. 1989) (op. on reh'g); *Goss*, 826 S.W.2d at 164-66; *Nobles v. State,* 843 S.W.2d 503 (1992)).

This so-called screening test or nexus requirement was derived from Justice O'Connor's statement that underlying this Court's decision in *Penry I* was the principle that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (*Penry I*) (emphasis added) (citing *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *see Ex parte Bower*, 823 S.W.2d 284, 286 (Tex.

Crim. App. 1991); *Lewis v. State*, 815 S.W.2d 560, 567 (Tex. Crim. App. 1991) (holding that *Penry I* analysis depends in the first instance upon whether proof of significant mitigating potential was actually placed in evidence).

Thus, a *Penry I* analysis began with a discussion of whether the evidence in the case was similar to the evidence in *Penry I*. *E.g.*, *Bower*, 823 S.W.2d at 286-87; *Lewis*, 815 S.W.2d at 567. In the absence of such evidence, the CCA simply concluded the statutory special issues were adequate, and no *Penry I* error existed. *Bower*, 823 S.W.2d at 287. If such evidence were found, however, reversal was automatic because the jury charge was necessarily constricted by the Texas special issues already found to be insufficient under such circumstances in *Penry I*.

So error under *Penry I* was more than mere charge error. It included a built-in finding that the jury was unable to consider evidence that showed the defendant's criminal act was attributable to a uniquely severe, permanent handicap, not of his own making, just like Penry's. Indeed, all of the *Penry I* reversals cited by Smith and amici are cases where, like Penry, the defendant presented evidence of mental retardation.[4] This analysis used by the CCA for claims of *Penry I* error rendered a harmless error review superfluous. If the defendant's evidence was deemed to be "*Penry* evidence," reversal was automatic because the case was legally and factually no different from *Penry I*.

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[4] *See Ramirez*, 815 S.W.2d at 656 (IQ score of 57); *Goodman*, 816 S.W.2d at 385-86 (IQ score of 56 and possible brain damage); *McGee*, 817 S.W.2d at 79-80 (IQ score of 66 and childhood abuse); *Williams*, 833 S.W.2d at 151-52 (IQ scores of 53 and 67); *Rios*, 846 S.W.2d at 315 (IQ scores of 55, 59, 66, and 67).

In failing to even acknowledge this screening approach to *Penry I* error, Smith and amici seem to take for granted that it was incorrect from its inception. But at the time it was used, it was not without support in the case law. As stated, it was derived from a direct quote in *Penry I*. Further, the Texas death penalty statute had been unsuccessfully challenged on similar grounds only a year prior to *Penry I* in *Franklin v. Lynaugh*, 487 U.S. 164 (1988). Franklin argued the Texas statute was unconstitutional because it did not allow the jury to consider and give effect to his disciplinary record in prison. This Court found that such evidence could be adequately considered within the second statutory punishment issue. *Id.* at 177. The Fifth Circuit made a similar conclusion in *Kelly v. Lynaugh*, and this Court denied certiorari review one week after issuing *Penry I*. *See Kelly v. Lynaugh*, 862 F.2d 1126, 1133, n.12 (5th Cir. 1988), *cert. denied*, 492 U.S. 925 (1989). Given this backdrop, it was not unreasonable for the CCA to conclude that Penry's situation was unique and that *Penry* error existed only when a defendant presented mitigating evidence similar to Penry's, i.e., evidence that his crime was attributable to a uniquely severe permanent handicap, not of his own making, such as mental retardation.

Once trial courts began using nullification instructions, the CCA addressed *Penry I* claims from the view that the nullification instruction provided a constitutionally adequate vehicle by which to give mitigating effect to the defendant's evidence. Indeed, all of the affirmances cited by Smith and amici, save one that will be discussed below, are cases where the CCA concluded that the nullification instruction resolved the *Penry I*

claim.[5] The fact that the CCA did not conduct harmless error analyses in these cases therefore means nothing: according to the CCA, there was no error to analyze.[6]

The remaining case cited by Smith and amici, *Heiselbetz v. State*, 906 S.W.2d 500, is not a charge error case at all. Smith's Reply Brief, p. 13; Appellate Judges' Amicus Brief, p. 10. Rather, Heiselbetz tried unsuccessfully to extend *Penry I* to claims of jury selection error. *Id.* at 508-09. It has no application to this case.

It was not until 2001 that this Court's opinion in *Penry II* struck down the CCA's reliance on nullification instructions. And, of course, in 2004, this Court struck down the screening test and nexus requirement that was the crux of many *Penry I* opinions. *See Tennard*, 542 U.S. at 284. Furthermore, as discussed in the State's original Brief in Opposition, it appears that this Court may now be reconsidering its holding that in most cases the former Texas special issues remain sufficient under the Eighth Amendment because they enable the jury to give "meaningful" effect and consideration to the defendant's mitigating evidence, opting instead for a rule borrowed from Justice O'Connor's dissent in *Johnson v. Texas* that a jury must be allowed to give mitigating evidence "full consideration and full effect." *Smith v. Texas,* 543 U.S. 37, 38, 46 (2004)

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[5] *See Fuller (Tyrone)*, 827 S.W.2d at 936-37; *Fuller (Aaron)*, 829 S.W.2d at 209; *San Miguel*, 864 S.W.2d at 495; *Robertson*, 871 S.W.2d at 710-11; *Wheatfall*, 882 S.W.2d 840-41; *Smith*, 898 S.W.2d 854; *Mason*, 905 S.W.2d at 576; *Goff*, 931 S.W.2d at 551, n.13.

[6] Nevertheless, and contrary to the assertions of opposing counsel that the CCA cases are "devoid of any discussion of harmless error," the CCA in *Goff* did note that the alleged jury charge error would not amount to egregious error or harm under *Almanza*. *Goff*. 931 S.W.2d at 551, n.13; Appellate Judges' Amicus Brief, p. 10. And a concurring opinion in *Goodman*, 816 S.W.2d at 388-89, also speculated that a harmless error analysis would be appropriate for *Penry I* error.

(quoting *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (quoting *Johnson v. Texas*, 509 U.S. 350, 381 (1993)).[7]

In short, not much remains of the CCA's *Penry I* jurisprudence. Opposing counsels' condemnation of the CCA based on a defunct body of jurisprudence is legally unsound. It fails to consider the vast changes made to *Penry* jurisprudence in 2001 and 2004. When the CCA has had the opportunity to consider *Penry* error since those changes have taken place, it has performed the very same *Almanza* harm analysis that it applied in this case. *E.g.*, *Penry v. State*, 178 S.W.3d 782, 788 (Tex. Crim. App. 2005) (*Penry III*) (applying *Almanza* egregious harm analysis where jury charge did not allow jury to consider evidence of mental impairment outside of mental retardation issue).[8] Accordingly, given the changes that have taken place in the CCA's *Penry* jurisprudence, it cannot be said that the CCA's harmless error review in this case was aberrational.

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[7] Smith unjustifiably asserts that the State's position on this issue is ridiculing this Court's articulation of its individualization standard. Smith's Reply Brief, p. 4-5. On the contrary, the State takes issue with *Smith's* clearly erroneous conclusion, based on his citation to one case (this one), that this Court has "repeatedly" insisted the Eighth Amendment requires a jury to give "full" consideration and effect to mitigating evidence. Petition, p. 16.

[8] The amicus brief for four appellate judges goes so far as to insinuate that the CCA applied the egregious harm standard to *reverse* Johnny Paul Penry's third conviction and death sentence in 2005, after this case was remanded, merely so it could later use the Penry reversal to justify its decision in this case. Appellate Judges' Amicus Brief, p. 9; *Penry III*, 178 S.W.3d 782; *see also* Smith's Reply Brief, p. 14.

That a divided, nine-member court would act as a body to sacrifice one capital murder conviction for the possible future affirmance of another capital murder conviction defies logic, has no factual support in this record, and is at odds with the reality of how appellate decisions are made. Moreover, while some vilification of the State of Texas is expected in this case--and is amply provided by Smith and amici to buttress their legal arguments--this particular insinuation crosses the line.

III. Charge error is not generally forfeitable in Texas.

It bears repeating that the lack of an objection to jury charge error, generally speaking, does not forfeit the error on appeal in Texas; it merely requires a more onerous showing of harm for reversal. *Almanza*, 686 S.W.2d at 171-72; *Jimenez v. State*, 32 S.W.3d 233, 237 (Tex. Crim. App. 2000). The opinions cited in note 2, *supra*, all attest to the fact that the lack of an objection to a jury charge does not forfeit the error, but simply requires an analysis for "egregious harm."

Smith relies on *Martinez v. Dretke*, 426 F.Supp.2d 403, 527 (W.D. Tex. 2006), to assert that Texas law "consistently and routinely" defaults federal constitutional challenges to jury instructions on state habeas review, unlike direct appeals. Smith's Reply Brief, p. 11-12. Thus, Smith contends, the CCA's failure to find procedural default in its original habeas opinion amounts to a genuine assessment of Smith's trial objection and a rejection of procedural default. And, the CCA's position on remand that Smith's failure to object at trial requires an "egregious harm" analysis under *Almanza* is, he concludes, a belated effort to revisit the procedural ruling in order to thwart this Court's ruling on the merits.

The federal court opinion in *Martinez* is badly researched. Texas does not "consistently and routinely" default charge error for the lack of a trial objection, even on habeas review. The procedural default argument was raised in *Martinez* by the court *sua sponte*. *Martinez*, 426 F.Supp.2d at 526. It is telling that the assistant attorney general representing the State of Texas did not see the merit of such an argument in that case.

Moreover, none of the many cases cited in *Martinez*, except two that will be discussed below, pertained to jury charge error: *Graves v. Cockrell* involved the procedural default of a due process claim based on the defendant's right to present witnesses on his behalf.[9] *Cotton v. Cockrell* involved the default of error based on the trial judge's comments during voir dire.[10] *Dowthitt v. Johnson* involved the procedural default of an evidentiary complaint.[11] *Muniz v. Johnson* involved the default of a complaint about the prosecutor's jury argument.[12] The procedural default discussion in *Sharp v. Johnson* involved complaints about the admission of evidence, pretrial publicity, and the failure to read the indictment to the jury.[13] The opinion in *Nichols v. Scott* pertained to the prosecutor's jury argument (although there was a *Penry* complaint rejected on the merits in the section immediately preceding the procedural bar discussion).[14] The issues subject to default in *Amos v. Scott* were evidentiary issues and a Sixth Amendment claim.[15] Thus, none of these cases support the holding in *Martinez* that jury charge error is defaulted by the failure to object at trial.

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[9] *Graves v. Cockrell*, 351 F.3d 143, 151-52 (5th Cir. 2003).

[10] *Cotton v. Cockrell*, 343 F.3d 746, 753-54 (5th Cir. 2003).

[11] *Dowthitt v. Johnson*, 230 F.3d 733, 751-52 (5th Cir. 2000).

[12] *Muniz v. Johnson*, 132 F.3d 214, 221-22 (5th Cir. 1998).

[13] *Sharp v. Johnson*, 107 F.3d 282, 285 (5th Cir. 1997).

[14] *Nichols v. Scott*, 69 F.3d 11255, 1278, n.44 (5th Cir. 1995).

[15] *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir. 1995).

One case cited in *Martinez* that actually involved a jury charge complaint contains two egregious flaws in its analysis. In *Rowell v. Dretke*, the state argued that the petitioner defaulted his habeas claim regarding charge error because it was "raised for the first time on habeas."[16] *Rowell* then equates this argument with an assertion of the contemporaneous objection rule. *Id.* at 374. These two concepts are not the same. The procedural bar that results from "raising an issue for the first time on habeas" originates from the notion that habeas review is for extraordinary relief and complaints that could have been raised on direct appeal are not cognizable on habeas. *See Goodman*, 816 S.W.2d at 385 (holding that writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal). This rule, particular to collateral proceedings, is sometimes referred to as a "cognizability" bar. *Weise v. State*, 55 S.W.3d 617, 619-20 (Tex. Crim. App. 2001). This is different from the contemporaneous objection rule, which forfeits error (for purposes of direct appeals and collateral review) when a defendant makes no objection to the trial court. The former cognizability bar is unaffected by the holding in *Almanza* and could easily be used to forfeit charge error on habeas review. But it is not based on the failure to object at trial.

In addition to this, the *Rowell* opinion cites *Barrientes v. Johnson* for the proposition that the "failure to timely object waives any error in jury *instructions* unless so prejudicial no instruction could cure the error." *Rowell*, 398 F.3d at 374 (emphasis

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[16] *Rowell v. Dretke*, 398 F.3d 370, 374 (5th Cir. 2005).

added). In fact, *Barrientes* involved jury *argument*, not jury instructions, and the rule attributed to *Barrientes* is the rule that applied to jury arguments in Texas until 1996.[17] Inexplicably, the *Martinez* opinion misinterprets *Barrientes* in the same way, holding that it involves a jury instruction complaint when it clearly involves jury argument.

There is one more case upon which *Martinez* relies that warrants separate discussion. *Martinez* cites *Rogers v. Scott* for the proposition that a federal habeas petitioner's failure to comply with Texas's contemporaneous objection rule also bars federal review. *Martinez*, 426 F.Supp.2d at 527. Rogers complained, however, that Texas courts often waived or ignored the contemporaneous objection requirement in *Penry* claims like the one he raised.[18] The *Rogers* court then *excused* the Texas courts' failure to regularly follow the contemporaneous objection rule with respect to *Penry* claims. Thus, *Rogers* is directly at odds with the proposition for which *Martinez* cites it.

Accordingly, the *Martinez* holding that Smith proffers to this Court is unreliable and inaccurate. The State stands by its assertion that, generally speaking, the failure to object to jury charge error in Texas does not forfeit the error, the State's argument on remand notwithstanding. Smith has not found, and will not find, any conclusive authority to the contrary. In fact, the CCA has specifically held in a habeas setting that, when it

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[17] *Barrientes v. Johnson*, 221 F.3d 741, 779 (5th Cir. 2000); *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) (overruling prior Texas law that the failure to object to jury argument does not waive error if the error is so prejudicial it could not be cured by an instruction to the jury to disregard and replacing it with the general contemporaneous objection rule).

[18] *Rogers v. Scott*, 70 F.3d 340, 342 (5th Cir. 1995).

comes to *Penry* error, Texas courts will not find procedural default based on the failure to raise the issue on appeal *or* the failure to object at trial. *Ex parte Baldree*, 810 S.W.2d 213, 214-215, n.2 (Tex. Crim. App. 1991).

In the face of this unfavorable law, Smith is compelled to complain that the State below argued procedural default on remand. But any competent advocate would argue for a proper *expansion* of procedural default to the facts of this case, given that procedural default as a general rule applies to Texas habeas claims (other than charge error) and that Smith waited until *nine years* after his trial to complain about the his jury charge. In this regard, Smith also protests at length the concurring opinion on remand of Judge Hervey, who would find Smith's claim procedurally defaulted. Smith's Reply Brief, p. 3, 4-5, 10-11,12, 14. While Smith's excessive reliance on these sources may help him build his "bait and switch" conspiracy theory, they provide no legal basis for certiorari review. The State is unaware of any authority that considers the State's brief or concurring opinions to be law in the State of Texas. The fact of the matter is that the CCA majority opinions did not address a procedural default argument in this case, either before or after remand. And if a Texas court has ever defaulted a *Penry* claim based on the defendant's failure to object at trial, surely Smith would have presented it to this Court by now.

Therefore, the CCA's failure to address procedural default in its original habeas opinion does not equate to a decision to reject a procedural default argument. Historically, procedural default has not been applied to claims of charge error or *Penry* error in Texas.

In any event, this entire procedural default argument is an irrelevant detractor. Smith's discussion of procedural default bears on this case only because he contends the CCA made an "about-face" and procedurally defaulted his claim when it conducted its egregious harm analysis on remand. The CCA did not discuss procedural default on remand and its harm analysis was, on its face, a harm analysis like the ones regularly conducted under *Almanza*. The lack of a trial objection merely determined the level of harm required for reversal.

Moreover, as Smith admits, it is a harm analysis more lenient than the harm analysis he would receive under federal law. *Compare Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); Smith's Reply Brief, p. 8, n. 4. It is also more lenient than the harmless error analysis used generally on state habeas review that the State urged on remand. *See Fierro v. State*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1991) (holding that, traditionally, a habeas corpus review of federal constitutional error that is subject to a harmless error review requires the applicant to show by a preponderance of the evidence that the error contributed to his conviction or punishment).

At its heart, this case is merely a disagreement about which harmless error review should be applied to *Penry II* error in state habeas court, and this Court should deny certiorari review.

IV. Misstated facts in the briefs of amici.

In accordance with Supreme Court Rule 15(2), it is appropriate to note that both amici have incorrectly recited the holdings of the CCA's original habeas opinion.

Appellate Judges' Amicus Brief, p. 4; Constitution Project Amicus Brief, p. 4. The CCA originally made three holdings independently sufficient to deny relief. The majority concluded that (1) Smith did not show evidence of a severe and permanent handicap, not of his own making, which is at least related to the offense, (2) Smith did not show that the disability evidence was beyond the reach of the two special issues, and (3) the nullification instruction in this case was sufficient to accord full weight to Smith's mitigation evidence. Smith's Appendix 2, p. 4, 6, 9. Although clearly set out and subtitled in the CCA opinion, amici entirely overlook this second holding regarding the sufficiency of the two special issues.

It is also necessary to note that the Constitution Project has misrepresented the facts to this Court. Amicus states in its brief, without citing the record, that Smith presented evidence that he had learning "disabilities" and that his father was a "violent drug addict." Constitution Project Amicus Brief, p. 3. In truth, Smith had one learning disability in the form of a speech handicap and there is absolutely no evidence in this case that his father was violent. Smith's Appendix 1, p. 6-7. The evidence of violent behavior in this record pertains only to the acts of Smith in carrying weapons, threatening his teachers, attacking Chris Standmier with a baseball bat, and torturing and murdering Jennifer Soto. Smith's Appendix 1, p. 4-6, 7.

CONCLUSION

The State moves this Court for leave to supplement its Brief in Opposition with the foregoing supplemental argument. For the reasons discussed above and for the reasons asserted in the State's Brief in Opposition, Smith's petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

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SUMMARY OF ARGUMENT

Respondent does not engage much less refute Petitioner's core contention in this case – that the Texas Court of Criminal Appeals' ("CCA") conclusion of "harmless error" was wholly based on its view that jurors could "take into account" Petitioner's evidence of his 78 I.Q., long-term placement in special education, and abusive family background. Having abandoned its defense of the CCA's opinion on its own terms, Respondent now insists that the CCA's judgment can be defended on the ground that Petitioner's mitigating evidence was insubstantial and marginalized in its presentation. But the CCA's own characterization of Petitioner's mitigating evidence, amply supported by the record in this case, compels the conclusion that Petitioner is entitled to relief on his federal constitutional claim even under the egregious harm standard applied by the CCA.

Even though Petitioner is plainly entitled to relief under the egregious harm standard, the CCA's imposition of that standard independently violates federal law. Respondent fails to offer any persuasive defense of the CCA's decision to revisit its determination regarding the adequacy of Petitioner's trial objection to the sentencing instructions, which was essential to trigger the CCA's heightened harm standard. The only fair reading of the CCA's decisions in this case is that the CCA impermissibly revisited the adequacy of Petitioner's trial objection. Far from constituting an independent and adequate state ground of decision, the CCA's post-remand finding that Petitioner's trial objection was inadequate, and its resulting imposition of its "egregious harm" standard, violated federal law. Because Petitioner undoubtedly suffered at least "some harm" given that his most compelling mitigating evidence could be given only aggravating effect at sentencing, the unjustified imposition of the egregious harm standard separately requires relief.

Much of the argument in Respondent's Brief and the *amicus* briefs offered on its behalf strays from the core

issues in this case and invites this Court to engage broad questions about the power of states to subject federal constitutional claims to harmless error review. This case, in which the outcome is dictated by the state court's unwillingness on remand to embrace this Court's federal constitutional holding, is an inappropriate vehicle for answering difficult, far-reaching questions about the appropriate contours of state harmless-error analysis. Because Petitioner does not rely, and does not need to rely, on the propositions attacked in the *amicus* briefs, this Court should simply hold that a state court may not reject the federal constitutional holding of this Court on remand by cloaking its rejection in purported harmless error analysis.

ARGUMENT

I. RESPONDENT FAILS TO ADDRESS PETITIONER'S CORE CONTENTION THAT THE STATE COURT'S HARMLESS ERROR ANALYSIS OF THE CONSTITUTIONAL ERROR IN THIS CASE CONSTITUTED A REJECTION OF THE MERITS OF THIS COURT'S OPINION.

Respondent inexplicably fails to address the first question presented in this case and the core argument for granting relief – that the CCA's conclusion of "harmless error" rested wholly on its view that jurors were able to give effect to Petitioner's mitigating evidence via the special issues and the nullification instruction, notwithstanding this Court's explicit rejection of that conclusion in its summary reversal. Contrary to Respondent's argument, the CCA did not deny relief because it viewed Petitioner's mitigating evidence of his 78 I.Q., his long-term placement in special education, and his abusive family background as insubstantial or unlikely to persuade jurors to return a life sentence. Instead, the CCA acknowledged, correctly, that Petitioner's "extensive mitigating evidence" was powerfully woven into a "compelling theory of the case." *Ex parte*

Smith, 185 S.W.3d 455, 471-72 (Tex. Crim. App. 2006); JA: 296, 298. But the CCA found no "egregious harm" because it explicitly challenged and rejected this Court's conclusions under *Penry I* and *Penry II* that the special issues and nullification instruction did not permit adequate consideration of Petitioner's concededly powerful mitigating evidence.

Despite this Court's clear holding that the inquiries of the Texas special issue scheme "had little, if anything, to do with the mitigation evidence petitioner presented," *Smith v. Texas*, 543 U.S. 37, 48 (2004); JA: 235, on remand the CCA concluded precisely the opposite – arguing that Petitioner's evidence of low intelligence, possibly organic brain impairment, and abusive background could somehow be given *mitigating* effect via the future dangerousness special issue. *Ex parte Smith*, 185 S.W.3d at 465-66; JA: 285-86. Indeed, notwithstanding the clarity of this Court's holding that the special issues failed to encompass Petitioner's mitigating evidence, the CCA announced on remand that "[t]he Supreme Court did not address our conclusion 'that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence.'" *Id.* at 465; JA: 281. Although the CCA ultimately and grudgingly acknowledged that "[i]t is possible that the two special issues may not have fully and completely encompassed every single bit of applicant's mitigation evidence," *id.* at 472; JA: 298, it is clear that its finding of no "egregious harm" was powerfully informed by its view, contrary to this Court's summary reversal, that the special issues in fact ensured significant consideration of Petitioner's evidence.

More fundamentally, the CCA's finding of harmless error depended on its view that the nullification instruction cured any *Penry I* error, again directly contrary to this Court's summary reversal. According to the CCA, this Court's opinion had identified only a "theoretical" problem with the nullification instruction, *Ex parte Smith*, 185 S.W.3d at 468; JA: 291, and the CCA concluded that

further examination of the record confirmed that jurors would have *actually* believed themselves free to falsify their answers to the special issues to achieve a life sentence. In reaching this conclusion, the CCA, as part of its purported "harm" analysis, reviewed the voir dire concerning jurors' willingness to follow the nullification command and emphasized that the prosecution had not insisted that jurors ignore evidence outside of the special issues. *Id.* at 468, 471; JA: 290, 296. These considerations culminated in the CCA's explicit conclusion that jurors were not precluded from "tak[ing] into account the specific evidence of [Petitioner's] relatively low I.Q. test at the age of thirteen, his participation in a special education reading program and speech therapy, or his troubled family background." *Id.* at 471; JA: 296-97. This conclusion, far from being a state ground for decision as urged by Respondent, is nothing less than a repudiation of this Court's federal constitutional judgment in this case "that the nullification instruction was constitutionally inadequate under *Penry II*." *Smith*, 543 U.S. at 48; JA: 236.

In its Brief in Opposition to Certiorari, Respondent sought to defend the CCA's approach, insisting that "the voir dire examination is the strongest evidence in this case against Smith's position" because "it indicates that *every juror who sat in judgment of Smith agreed to use the nullification instruction to change a true 'yes' answer to 'no' if he or she believed the mitigating evidence warranted a life sentence.*" B.I.O. at 25 (emphasis in original).[1] Now, Respondent has reversed course and makes no effort to defend the CCA's opinion on its own terms. Instead, Respondent blandly and generally claims that the CCA has "consistently strived to properly implement the Court's evolving capital jurisprudence," Respondent's Brief

[1] This language also appears virtually verbatim in Respondent's pleadings on remand urging the CCA to hold that jurors could in fact have given effect to Petitioner's mitigating evidence via the nullification instruction. *See* Reply Brief on Remand at 6; JA: 263.

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("R.B.") at 8, without discussing much less engaging the CCA's obvious rejection of this Court's holding that the special issues and nullification instruction were constitutionally inadequate in the context of petitioner's trial. Instead, Respondent mischaracterizes Petitioner's objection to the CCA's opinion as a claim that the CCA violated "not the letter, but really the *spirit* of the summary reversal." R.B. at 20 (emphasis in original). In doing so, Respondent ignores the numerous quotations from the CCA's opinion that flatly contradict quotations from "the letter" of this Court's summary reversal.

Although the bulk of the CCA's opinion sought to establish the absence of *Penry I* error and the workability of the nullification instruction in this case, and the bulk of Petitioner's brief demonstrated that such an approach was inconsistent with this Court's mandate, Respondent fails altogether to address this issue. That failure compels the conclusion that there is simply no plausible defense of the CCA's reasoning in the decision below.

II. STRIPPED OF ITS REPUDIATION OF THIS COURT'S SUMMARY REVERSAL, THE CCA'S DECISION ON ITS OWN TERMS REQUIRES RELIEF.

Once it is acknowledged, as this Court has already held, that the special issues and nullification instruction failed to ensure constitutionally adequate consideration of Petitioner's evidence of his mental impairment and abusive background, the constitutional error found by this Court cannot be dismissed as harmless, even under the egregious harm standard applied by the CCA. For the reasons we argue below, *see infra* Part III, the CCA's application of its egregious harm test was itself an impermissible evasion of this Court's mandate, and Respondent has offered nothing to undermine that conclusion. This Court could nonetheless grant relief without deciding that issue because the constitutional error in this case deprived Petitioner of a "fundamentally fair trial" under the CCA's

egregious harm standard. *Ex parte Smith*, 185 S.W.3d at 472; JA: 298. The CCA's own characterization of Petitioner's strong mitigation case, independently confirmed by the trial record, establishes that the error in this case was not harmless under any standard, once the CCA's decision is shorn of its impermissible attempt to revisit this Court's *Penry I* and *Penry II* rulings.

The CCA itself repeatedly acknowledged the scope and power of Petitioner's mitigating evidence. The CCA never denigrated the quantity or the significance of the mitigating evidence offered by Petitioner; rather, the *only* ground the CCA offered for finding that Petitioner had not suffered egregious harm was its failed attempt to avoid this Court's conclusions that *Penry I* and *Penry II* error in fact occurred. The CCA's portrayal of Petitioner's mitigating evidence as "extensive" and of its presentation as "dramatic," *Ex parte Smith*, 185 S.W.3d at 471-72; JA: 296-98, is amply borne out by the record of both the guilt and penalty phases of Petitioner's trial, in which extensive testimony, documentary evidence, and argument were focused upon his cognitive impairments and his traumatic childhood. But this extensive evidence – including evidence of his 78 I.Q., his life-long learning disabilities that resulted in his placement in 9th grade at the age of 19, and his abusive family situation – could not be given mitigating effect, leaving only its aggravating import as to Petitioner's future dangerousness before the jury. Without the CCA's impermissible conclusion that jurors were able "to take into account" precisely these mitigating facts, *id.*, it is plain that Petitioner's capital sentencing proceeding cannot be deemed fundamentally fair. As this Court stated in its summary reversal in this case, "[t]here is no question that a jury might well have considered petitioner's I.Q. scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death." *Smith*, 543 U.S. at 44; JA: 231-32.

Respondent resists this obvious conclusion by repudiating the CCA's own characterization of the strength of Petitioner's mitigating evidence, by distorting the record of Petitioner's trial, and by disregarding this Court's precedents on the significance of evidence of mental impairment and childhood abuse. Respondent's claim that Petitioner's evidence of mental impairment and abusive childhood was not a prominent part of the defense case runs counter to the CCA's own depiction of the trial and grossly misrepresents the record in this case. Defense counsel laid the groundwork for the mitigation case during the guilt phase of the trial. Petitioner's mother, Johnnie Mae Smith, testified at length about Petitioner's intellectual deficits, early developmental problems, and his inability to progress at school. JA: 49-59. She also described the impact on LaRoyce of the behavior of his father, who repeatedly stole from the family to support his crack-cocaine habit. JA: 55-58. LaRoyce also testified about his father's abuse, including an incident in which his father threatened him with a butcher knife while attempting to steal the family car. JA: 61-62. At guilt-phase closing arguments, defense counsel emphasized LaRoyce's comparative lack of culpability in light of his mental impairment. JA: 66 ("LaRoyce is the one who flunks the first grade after he's been in Head Start since he was three years old. LaRoyce is 19 years old and he's in the ninth grade. Yeah, he's the brains.").

During the punishment phase, the most important defense witness by any measure was Alberta Pingle, a specialist in the Dallas Independent School District special education department. Through Ms. Pingle, the defense offered into evidence voluminous school records documenting LaRoyce's low intelligence, low achievement, learning disabilities, and possibly organic brain impairment. Ms. Pingle testified that LaRoyce had been identified at the earliest stages of his schooling as a slow learner with learning disabilities and speech handicaps. JA: 75-79. She also stated that testing through the school district indicated that LaRoyce's verbal I.Q. was 75 and full scale I.Q.

was 78. JA: 85; JA II: 58. Through Ms. Pingle, the defense also introduced an expert's report that indicated that LaRoyce's learning problems were possibly organic in nature. JA: 80-81; JA II: 25. The school records introduced via Ms. Pingle and discussed by her in front of the jury offered a compelling account of LaRoyce's lifelong impairment and academic failures. *See* Petitioner's Brief ("P.B.") at 4-5.

Respondent seeks to minimize the significance of this extensive presentation by arguing that Ms. Pingle was only one of twenty defense witnesses and that the "vast majority" of those witnesses testified about LaRoyce's nonviolent character. R.B. at 36. Although only "one" witness, Ms. Pingle's testimony allowed the jury to "hear" from the scores of teachers, special education committees, and school psychologists who had documented LaRoyce's impairments over fourteen years. Although only "one" of twenty defense witnesses, Ms. Pingle's testimony accounted for over one-quarter of the defense testimony offered at the punishment phase. Moreover, through Ms. Pingle, the jury received over two hundred pages of school records (the entire second volume of the Joint Appendix in this case) and even the prosecution emphasized that the jury had the "entire files" concerning LaRoyce's school performance. JA: 96. Tellingly, defense counsel sought to emphasize the school records by organizing them into several enlarged charts that were separately introduced as exhibits. JA: 74-75; Defense Exhibits 39, 48, 50. The prosecution repeatedly objected, unsuccessfully, to the admission of these exhibits, JA: 74, and engaged in more cross-examination of LaRoyce's punishment-phase witnesses on the issue of his low intelligence than on his nonviolent character. When the jury undertook its punishment-phase deliberations, the hundreds of pages of school records, charts, and testimony documenting LaRoyce's intellectual impairment offered by far the strongest basis for withholding a death sentence, yet the sentencing instructions did not ensure that jurors could use such

evidence other than as support for the State's case that LaRoyce would be dangerous in the future.[2]

Notwithstanding this extensive presentation of evidence of mental impairment and parental abuse, Respondent insists that the error in this case should be deemed harmless because, unlike Penry, Petitioner failed to offer evidence of "mental retardation." According to Respondent, if *Penry* error involving defendants with evidence of mental impairment short of mental retardation can be deemed harmful, *Penry* error would essentially become "structural" and require relief in all cases. R.B. at 40. Respondent's position looks suspiciously like the CCA position[3] that this Court summarily reversed here and rejected in *Tennard* – that *Penry* applies only to defendants with evidence of mental retardation. *See Tennard v. Dretke*, 542 U.S. 274, 288 (2004). When, as here, the defendant offers an extensive case of mental impairment and parental abuse through numerous witnesses and detailed exhibits, the CCA acknowledges the powerful presentation of that evidence, and this Court holds that the evidence was beyond the effective reach of the jury, Respondent cannot resurrect the discredited "mental retardation" bar as a prerequisite to relief for the acknowledged constitutional violation.

Nor can Respondent claim that the presence of other defense witnesses somehow diminished the harm of the constitutional error in this case. The fact that the defense offered extensive rebuttal testimony to the State's case on future dangerousness *enhances*, rather than detracts from,

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[2] Several of the remaining witnesses testified about the difficulties LaRoyce faced in light of his father's abusive actions toward him and the family. *See* P.B. at 5; JA: 69 (testimony of Reverend Nicks); JA: 104 (testimony of Dorothy Faye Ellis); JA: 101 (testimony of Myron Wilson).

[3] *See Ex parte Smith*, 132 S.W.3d 404, 414 (Tex. Crim. App. 2004); JA: 187 (CCA holding, in its first denial of relief in this case, that Petitioner's evidence was addressable within the special issues because a " 'slow learner' is not, *ipso facto*, mentally retarded").

the likelihood of harm in this case; the jury's inability to give effect to Petitioner's *affirmative* mitigating case is of much greater significance where the State's dangerousness case has been vigorously contested. Moreover, the fact that defense counsel made a wide range of arguments in his punishment-phase closing argument in no way suggests that the evidence of impairment and abuse was insubstantial. Defense counsel had already raised the issue of Petitioner's mental impairment during the guilt-phase closing argument. JA: 66. His punishment-phase closing emphasized again that Petitioner had been in special education for years, and that his school testing revealed an I.Q. of 78. Defense counsel specifically argued that LaRoyce was "eight points from being mentally retarded" and that the "medical diagnosis" of his learning disability pointed to a potentially "organic" cause. JA: 120. In light of the overwhelming testimony and documents introduced by Petitioner to establish his impairment, and trial counsel's repeated efforts to highlight those facts in both the guilt and punishment phase arguments, Respondent cannot assert that the jury's inability to consider such evidence was harmless on the grounds that the defense argued other points as well.[4] Indeed, under Respondent's page-counting approach to the closing argument, undisputed evidence of mental retardation might itself be deemed harmless if defense counsel, as here, makes his

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[4] The unreasonableness of Respondent's efforts to trivialize Petitioner's impairment is reflected in its claim that "two witnesses who knew Smith well" testified to his average or above-average intelligence. R.B. at 39 n.40. That testimony came on the State's cross-examination of LaRoyce's fiancée and prospective mother-in-law. JA: 97-99. Respondent's effort to minimize the significance of Petitioner's impairment is also difficult to square with this Court's characterization of Petitioner's evidence in its summary reversal. *Smith*, 543 U.S. at 44; JA: 231 (indicating that Petitioner, like the defendant in *Tennard v. Dretke*, 542 U.S. 274, 278 (2004), offered evidence of " 'significantly impaired intellectual functioning' ").

point about the existence of the significant impairment and moves on.

Respondent's attempt to minimize the importance of Petitioner's mitigating evidence also flies in the face of this Court's decisions on the mitigating significance of evidence of low intelligence and childhood abuse. As for low intelligence, this Court has recognized that cognitive impairment at the level of mental retardation renders a defendant constitutionally ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002). Petitioner, whose 78 I.Q. placed him "eight points from being mentally retarded," JA: 120, and whose school records documented a lifetime of impaired intellectual functioning, JA II, had an extremely strong claim of "diminish[ed] personal culpability" for his actions based on his intellectual deficiencies. *Atkins*, 536 U.S. at 318. As for childhood abuse, this Court has repeatedly recognized the power of such evidence to sway the single juror necessary to elicit a life sentence. *See Wiggins v. Smith*, 539 U.S. 510, 512 (2003) (evidence of childhood abuse established a "reasonable probability that at least one juror would have struck a different balance"); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (evidence that defendant was borderline mentally retarded, coupled with evidence of childhood abuse, "might well have influenced the jury's appraisal of his moral culpability").

Moreover, unlike the defendants in *Wiggins* and *Williams*, who were merely denied the mitigating effect of evidence of their cognitive impairments and childhood abuse because their lawyers failed to present it, Petitioner was also harmed by the "double-edged" effect of his evidence, because it offered the jury new reason to consider him dangerous, yet provided no vehicle for giving the evidence mitigating effect. Respondent seeks to deflect this concern by arguing that "under *Tennard*," Petitioner's evidence was not "two-edged" because it was not as severe

as Penry's. R.B. at 40. It is extraordinary that Respondent refers to *Tennard* (without citing any particular page) for this proposition, because this Court in *Tennard* held exactly the opposite: "[T]he jury might well have given Tennard's low I.Q. evidence aggravating effect in considering his future dangerousness . . . as a matter of probable inference." 542 U.S. at 288-89. Only the *dissent* in *Tennard* embraced Respondent's position that "low intelligence is not the same as mental retardation and does not necessarily create the same *Penry I* 'two-edged sword.'" 542 U.S. at 292-93 (Rehnquist, C.J., dissenting). Respondent's argument for harmless error in this case is wholly dependent on such distortions of this Court's holdings on the significance of evidence of low intelligence and childhood abuse in the context of the Texas capital sentencing scheme.[5]

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[5] Respondent also devotes substantial argument to establish that "*Penry* error is not structural error exempt from harmless-error analysis." R.B. at 40. Petitioner has not sought reversal on that basis, believing that the CCA's finding of harmlessness must be reversed in any event because its finding of harm depended wholly on its rejection of this Court's federal constitutional holding. In a similar vein, the *amicus* briefs filed on behalf of Respondent seek to go beyond the issues before this Court and to transform a fact-bound case of state non-compliance with this Court's mandate into a vehicle for abstract theorizing about presently-immaterial principles relating to the permissible scope of state harmless error analysis in general. The brief filed on behalf of the *amici* States, like Respondent's brief, urges this Court to decide whether *Penry* error is subject to harmless error analysis (although, *amici* States, like Respondent, do not address whether *Penry II* error is structural because it filters all of the mitigating evidence in the case through a command to deliver a false verdict). The *amici* States also seek a declaration from this Court that state courts and legislatures are free to adopt whatever standard of harm they choose in state post-conviction proceedings, on the theory that states need not provide post-conviction fora at all. But since Petitioner does not challenge in this litigation the power of states to apply non-*Chapman* harmless error rules in state post-conviction proceedings to unpreserved claims, all of the arguments advanced by the *amici* States are beside the point and calculated to produce a broad rule of decision in a non-adversarial posture.

III. BECAUSE THE CCA REVISITED THE ADEQUACY OF PETITIONER'S CONTEMPORANEOUS OBJECTION AFTER THIS COURT'S SUMMARY REVERSAL, THE CCA'S REQUIREMENT OF 'EGREGIOUS HARM' VIOLATED FEDERAL LAW.

Just as Respondent makes no effort to defend the CCA's conclusion that jurors were able to give effect to Petitioner's evidence via the special issues and nullification instruction, Respondent does not defend the CCA's prerogative to change its mind about the adequacy of Petitioner's *Penry* objection at trial in response to this Court's summary reversal. Instead, Respondent strains to claim no conflict between the pre-remand and post-remand treatment of Petitioner's trial objection. But the only fair reading of the CCA's opinions confirms that the CCA in fact changed its mind about the adequacy of Petitioner's trial objection only after this Court rejected its federal constitutional holding. Far from constituting an independent and adequate state ground of decision, the CCA's inconsistent treatment of Petitioner's trial objection amounts to an impermissible obstacle to the vindication of this Court's constitutional judgment. Moreover, the trial record confirms that Petitioner preserved his *Penry* claim and the CCA's contrary conclusion itself rests on a misunderstanding of the underlying federal constitutional claim.

Respondent argues that the charge that the CCA changed its mind about the adequacy of Petitioner's *Penry* objection at trial "conflates the doctrines of procedural default and harmless error." R.B. at 21. In Respondent's view, because the CCA did not actually impose a procedural default on remand (after declining to do so before remand), the CCA did not "revisit" its earlier conclusion regarding procedural default. *Id.* ("Just as before, the Court of Criminal Appeals in *Smith III* declined to find Smith's *Penry* challenge to be procedurally defaulted."). The problem with this argument is that *exactly* the same issue controlled whether Petitioner's claim was procedurally defaulted and whether Petitioner's claim was

unpreserved so as to trigger the "egregious harm" standard: whether Petitioner's *Penry* objection at trial was adequate to preserve his claim. If the CCA had deemed Petitioner's trial objection to be inadequate, it would have defaulted Petitioner's claim at the outset.

Recognizing this inconsistency, Respondent now insists that the best explanation for the CCA's refusal to default Petitioner's claim pre-remand is that *Penry* claims are not subject to procedural default. But this position finds no support in the opinions in this case. The four judges who would have imposed such a default pre-remand obviously asserted otherwise, and nothing in the post-remand opinions endorses Respondent's effort to harmonize the CCA's pre- and post-remand actions by disavowing the applicability of procedural default to *Penry* claims. If such harmonization were possible, it is reasonable to expect the CCA would have made the case, especially in light of the charge by the post-remand dissenting opinion that the CCA had simply reversed itself in finding Petitioner's *Penry* claim unpreserved. *See Ex parte Smith*, 185 S.W.3d at 479; JA: 311-312 (Holcomb, J., dissenting) ("[B]ecause the majority now suddenly thinks that Smith did not preserve error in the trial court – despite the fact that the majority once rejected the procedural default argument and twice addressed the claim on the merits, the majority applies our burdensome state-law 'egregious harm' analysis to Smith's Eighth Amendment claim.").

Nor does Respondent cite a single state or federal case that asserts that *Penry* claims are non-defaultable on state habeas under Texas law. As argued in Petitioner's initial brief, the CCA has plainly held such claims defaulted on state habeas, and the federal courts have consistently sustained such defaults on federal habeas. Respondent tries to explain away the CCA's imposition of a procedural default against the *Penry* claim that was at issue in *Nichols v. Scott*, 69 F.3d 1255, 1266 (5th Cir. 1995), by implying that the federal court must have mistakenly apprehended the CCA's imposition of such a default.

Respondent argues that the CCA's "underlying" opinion at issue in *Nichols* applied the "egregious harm" test of *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985), and did not default the defendant's claim. R.B. at 26, n.29. Contrary to Respondent's representation, the CCA emphatically *did* default Nichols' claim on state habeas,[6] and the Fifth Circuit's decision specifically upheld that default in its opinion. 69 F.3d at 1266.[7] Indeed, Respondent has successfully defended scores of convictions in federal court on the ground that the jury-charge error was defaulted in state court, and recent federal case law confirms the unbroken line of cases on state habeas applying defaults to such claims. *Martinez v. Dretke*, 426 F. Supp. 2d 403, 527 (W.D. Tex. 2006).[8]

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[6] The CCA's order denying state habeas relief, *Ex parte Nichols*, Wr. No. 21,253-01 (Tex. Crim. App. Dec. 12, 1991), attached hereto, adopted the trial court's recommended findings of fact and conclusions of law, which stated that "the applicant is *procedurally barred* from advancing his [*Penry*] claim" concerning the adequacy of the special issues to ensure consideration of his non-triggerman status. *Ex parte Nichols*, Trial Court's Findings of Fact and Conclusions of Law (captioned "Respondent's Findings of Fact, Conclusions of Law and Order"), No. 323836-A, at 28 (June 28, 1991) (emphasis added), excerpt attached hereto.

[7] Respondent's misleading citation to the CCA's opinion on *direct appeal* in no way undercuts the fact that the CCA has consistently and unequivocally subjected constitutional claims concerning jury instructions to procedural default on state habeas. The CCA's reliance on *Almanza* on direct appeal is fully consistent with Petitioner's view that *Almanza* was designed as a standard for the consideration of unobjected-to error on *direct* review – a state analog to the federal "plain error" rule. Petitioner's Brief at 47 n.16. The application of *Almanza* in this way on direct appeal has never caused the CCA or any federal court to call into question the defaultability of such claims on state habeas.

[8] Conspicuously absent from Respondent's Brief is any effort to address the language from *Martinez* quoted in Petitioner's Brief; indeed, Respondent does not cite or discuss *Martinez* in its Brief.

More damning than the absence of any affirmative support for its assertion that *Penry* claims are not defaultable is Respondent's *own advocacy* in this litigation. On remand from this Court's summary reversal, Respondent argued vehemently that the CCA should impose the procedural default that it had declined to impose pre-remand. State's Brief on Remand at 7, JA: 246 ("Applicant has procedurally defaulted this claim under Texas law because he did not raise any objection to the charge at trial or on appeal."). Respondent did so with the express promise to the CCA that such a ruling would foreclose further review of Petitioner's constitutional claim by this Court. *Id.* at 8; JA: 246-47. Respondent's Brief offers no explanation for advancing one interpretation of state law before the CCA when it regarded that interpretation as favorable to its cause, and then advancing a contradictory interpretation to this Court as it became convenient. Given that much of Respondent's Brief amounts to representations about the status of state law, and that Respondent has demonstrated a propensity to tailor such representations to suit its present needs, this Court should be particularly hesitant to credit Respondent's current insistence on the non-defaultability of *Penry* claims on state habeas, especially in the complete absence of any state or federal citations supporting that proposition.[9] In

[9] Respondent devotes considerable space to establish that the application of the *Almanza* rule to Petitioner's *Penry* claim on state habeas was not aberrational and consistent with "well-established Texas law." R.B. at 24. Notwithstanding the numerous citations contained in its brief, Respondent fails to identify a *single* case in which a defendant alleging *Penry* error was denied habeas relief for failing to establish egregious harm. Indeed, the only case Respondent cites as actually applying the egregious harm standard to a *Penry* claim was on direct appeal, *Chambers v. State*, 903 S.W.2d 21, 34-35 (Tex. Crim. App. 1995), and that case plainly *declined* to apply *Almanza*'s egregious harm standard to Chambers' *Penry* claim though it applied it to other issues. Respondent also fails to cite a *single* case over the last sixteen years in which the CCA applied the *Almanza* egregious harm standard on state habeas *at all*, *see* R.B. at 24 n.26 (cites to state habeas cases

(Continued on following page)

contrast, it should be noted that Petitioner has never in this litigation argued that *Penry* claims are non-defaultable, even when Respondent urged the CCA to impose such a default on remand.[10]

Accordingly, the CCA's refusal to impose a procedural default pre-remand cannot be dismissed on the grounds that such claims are not defaultable but rather must be read, as Judge Holcomb argued in dissent, as rejecting the claim that Petitioner's trial objection was inadequate. For the reasons urged in Petitioner's Brief, state courts must not be permitted to revisit procedural determinations post-remand to defeat the enforcement of this

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invoking *Almanza* end in 1989), confirming Petitioner's position that *Almanza* is a state-law analog to plain error review confined to *direct appeals*. Perhaps the most telling rebuttal to Respondent's claim that the "egregious harm" standard is a "well-settled" principle of law applicable to state habeas is the fact that Respondent argued post-remand for a *different standard* of harm to apply to this case. State's Reply Brief on Remand at 1; JA: 259 (contending that "it is the applicant's burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment") (citing *Fierro v. State*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1991)). Thus, the CCA's innovative invocation of the "egregious harm" standard in this case cannot plausibly be viewed as a routine application of state harmless error principles.

[10] Respondent's alternative argument that *Penry* claims are defaultable, but excused from default under the right-not-recognized doctrine, is likewise unavailing. While it is true that defendants tried *before* the *Penry* decision in 1989 were later excused for their lack of a contemporaneous objection under that doctrine, Petitioner was tried *after Penry* was decided. Moreover, just as with Respondent's argument about the non-defaultability of *Penry* claims, Respondent again contradicts its arguments below, where Respondent adamantly claimed that Petitioner's purported failure to make an adequate trial objection for his *Penry* claim could not fit within any exception to procedural default. State's Brief on Remand at 7-8; JA: 246. As indicated in our initial brief, P.B. at 45, these cases confirm the applicability of procedural default law to *Penry* claims.

Court's constitutional judgment, a basic proposition which Respondent does not dispute.[11]

Moreover, the CCA's pre-remand refusal to find Petitioner's *Penry* objection at trial inadequate was plainly correct, and Respondent's effort to defend its post-remand contrary finding is unavailing. Respondent acknowledges that Petitioner adequately challenged the inability of the

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[11] The *Amicus* Criminal Justice Legal Foundation ("CJLF") argues that state courts should not lose their ability to apply heightened standards of harm based on the absence of a contemporaneous objection merely because they addressed the merits of a federal constitutional claim prior to this Court's intervention. CJLF Brief at 4. Whatever the merits of that proposition, the *amicus* CJLF does not come to terms with the facts of this case, in which the claim regarding the inadequacy of the trial objection was raised, discussed, and not embraced by the state court. In such circumstances, the only fair reading of the state court action is that it *chose* not to impose the procedural impediment rather than overlooked it. Indeed, in such circumstances, the state court had clearly abandoned the procedural defense for virtually all purposes. If this case had proceeded unimpeded to federal habeas review, as do virtually all denials of state habeas relief in capital cases, the state could no longer seek enforcement of the purported procedural impediment. Under *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the failure of the state court to invoke the procedural barrier would preclude its application on federal habeas review. The *only* circumstance in which the issue of the present case arises is when the state court seeks the belated enforcement of the procedural impediment *after* this Court has reversed the state court's federal constitutional determination on the merits. In these limited circumstances, state courts cannot, as in this case, send the signal to this Court that the case is not procedurally compromised, and then render this Court's opinion advisory by revisiting its determination of procedural irregularity. For this reason, the *amicus* CJLF's attempt to analogize to *federal* cases applying plain error review following remand from this Court is deeply flawed. CJLF at 5-8. *Federal* burdens to federal constitutional claims do not present the same hazards for this Court's jurisdictional limits as state procedural obstacles, which constitute independent and adequate grounds of decision. Second, in those federal cases, there is no parallel risk that the federal court is imposing the post-remand procedural obstacle to frustrate this Court's subsequent review or enforcement of federal constitutional norms.

special issues on their own to ensure consideration of Petitioner's mitigating evidence. Respondent also acknowledges that Petitioner objected to the nullification instruction on the basis that Texas law did not authorize any special verdict questions beyond those approved by the legislature. R.B. at 32. In Respondent's view, though, Petitioner's objections were inadequate for two reasons: because trial counsel did not specifically explain how the nullification instruction caused *Penry* error in his case and because trial counsel did not propose an alternative formulation of the nullification instruction. Both of these contentions are without merit. Contrary to Respondent's (and the CCA's) position, the nullification instruction did not *cause* the *Penry* error in his case, it simply failed to *fix* it, and Petitioner clearly and emphatically objected that his mitigating evidence could not be given adequate effect via the Texas special issue scheme.[12]

Nor was trial counsel obligated to tinker with the nullification instruction in order to preserve his claim. As this Court indicated in its summary reversal, the problem with the nullification in this case was not its particular phrasing; rather "*Penry II* identified a broad and intractable problem – a problem that the state court ignored here – inherent in any requirement that the jury nullify special issues contained with the verdict form." *Smith*, 543 U.S. at 46; JA: 233. Had Petitioner offered and the trial court adopted a different version of the nullification instruction, petitioner would have *waived* the resulting *Penry* error, which is precisely why Texas law has never required a defendant to offer an alternative instruction once he has objected to the proposed charge. *See Ex parte Smith*, 185

[12] Interestingly, in explaining the purportedly limited reach of *Penry II* in its briefs in *Brewer v. Quarterman*, No. 05-11287, and *Abdul-Kabir v. Quarterman*, No. 05-11284, the State offers precisely this account of *Penry II*: "In essence, the supplemental instruction did not *create* new error; rather, the instruction simply *failed to correct* the error identified in *Penry I*." R.B. in *Brewer* at 24; R.B. in *Abdul-Kabir* at 23-24.

.W.3d at 476 n.6; JA: 306-307 (Holcomb, J., dissenting) quoting Texas Code of Criminal Procedure provision that tates that "in no event shall it be necessary for the efendant or his counsel to present special requested harges to preserve or maintain any error assigned to the harge").

Thus, the CCA's refusal to find Petitioner's trial objec-on inadequate pre-remand was correct, and the CCA's ost-remand contrary finding reflects a misunderstanding f Petitioner's federal constitutional claim under *Penry*. ccordingly, the CCA was wrong to apply its "egregious arm" standard as an obstacle to relief, and Petitioner's lain and undisputed showing of at least "some harm" ictates reversal of Petitioner's death sentence.

CONCLUSION

Neither Respondent nor the *amici* briefs filed on its ehalf come to terms with the only genuine issue in this tigation: whether state courts may flout this Court's irection following a summary reversal. This Court should rmly declare that a state court may not reject the federal onstitutional holding of this Court on remand and cloak s rejection in purported harmless error analysis.

Respectfully submitted,

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EX PARTE JOSEPH BERNARD NICHOLS

Habeas Corpus Application

WRIT NO. 21,253-01

from HARRIS County

(Tex.Crim.App. Dec. 12, 1991)

ORDER

This is a post conviction application for a writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

Applicant was convicted of the offense of capital murder on February 24, 1982. After the jury answered the special issues submitted under Article 37.071, V.A.C.C.P., in the affirmative, punishment was assessed at death. This Court affirmed applicant's conviction. Nichols v. State, 754 S.W.2d 185 (Tex.Cr.App. 1988).

In the instant cause, applicant presents twenty-four (24) allegations challenging the validity of his conviction. The trial court, after holding an evidentiary hearing, has entered findings of fact and conclusions of law and recommended the relief sought be denied. This Court has reviewed the record with respect to the allegations now made by applicant and finds that the findings and conclusions entered by the trial court are supported by the record.

The relief sought is denied.

IT IS SO ORDERED THIS THE 12TH DAY OF DECEMBER, 1991.

PER CURIAM.

Clinton and Maloney, JJ., would grant nos. 13, 14 and 15.
En banc
Do not publish

CAUSE NO. 323836-A

EX PARTE	§	IN THE 178TH DISTRICT
	§	-COURT
JOSEPH BERNARD NICHOLS,	§	OF
	§	
Applicant	§	HARRIS COUNTY, TEXAS

(June 28, 1991)

RESPONDENT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Having considered the Petition for Writ of Habeas Corpus, Applicant's First, Second and Third Amended Petitions for Postconviction Writ of Habeas Corpus, Respondent's Original Answer, Respondent's Amended Answer, the court-ordered affidavits, and the evidence elicited at the evidentiary hearing held in the above-captioned cause, the court makes the following Findings of Fact and Conclusions of Law based upon the documents filed in said cause and the official court records.

* * *

35. Because the applicant failed to request an anti-parties charge or to object to the jury instructions given at punishment on the basis that the Texas death penalty scheme precluded the jury from considering or giving effect to the mitigating evidence that the applicant allegedly did not kill the complainant, the applicant is procedurally barred from advancing his claim that the Texas death penalty scheme precluded the jury from assessing a life sentence after deciding that the applicant was less morally culpable based on its belief that the applicant was not the triggerman.

36. In the alternative, the special issues themselves focused the jury's attention on the applicant, not Willie Williams. Further, the language of the first special issue did not prevent the jury from giving proper weight or any weight to any mitigating evidence that the applicant did not fire the bullet which killed the complainant.

37. In the alternative, the jury's affirmative answer of the first special issue does not violate the precepts of **Edmund v. Florida**, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982), and the imposition of the death penalty does not violate the eighth amendment or the precepts of **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978).

* * *

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause number 323836-A and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 323836-A, including his Petition of Writ of Habeas Corpus and his first, second, and third Amended Petitions for Writ of Habeas Corpus;

2. the Respondent's Original Answer and the Respondent's Amended Answer in cause number 323836-A;

3. this court's findings of fact, conclusions of law and order denying relief;

4. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent;

5. a transcript of the writ evidentiary hearing held on October 19, 1990, and November 2, 1990;

6. the affidavits of Robert Scott and Neil Lane;

7. the appellate record in State v. Willie Ray Williams, Cause No. 323764, unless it has been previously forwarded to the Court of Criminal Appeals;

8. the indictment, judgment, sentence, docket sheet, and appellate record in cause number 323836, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Michael Kuhn and Sarah Cowen, Bracewell & Patterson; 2900 South Tower Pennzoil Place; Houston, Texas 77002, and to Respondent: Roe Wilson; Harris County District Attorney's Office; 201 Fannin; Houston, Texas 77002-1901.

SIGNED this 28 day of June, 1991.

/s/ William Harmon
JUDGE PRESIDING

718B

No. 05-11304

In the Supreme Court of the United States

LAROYCE LATHAIR SMITH, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEVADA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Court of Criminal Appeals correctly determined that a *Penry* error can be subject to harmless-error review.

2. If so, whether the Court of Criminal Appeals properly applied a state-law harmless-error standard to determine whether the *Penry* error in this case warranted relief under state habeas law.

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A. This Court has consistently held that jury instruction errors are subject to harmless-error review. 9

B. *Penry* errors should be treated the same as other jury instruction errors and subject to harmless-error review. 12

II. The Court Below Was Constitutionally Permitted To Determine That State Habeas Relief Was Not Warranted Where The *Penry* Error Was Harmless Under The State Harmless-Error Standard. 16

A. States that provide post-conviction remedies have broad discretion to determine when such remedies should be awarded 17

B. In their post-conviction proceedings, States are constitutionally permitted to apply, and often do apply, harmless-error standards that differ from the relevant federal standards. 19

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

This case raises important questions, not only about the propriety of harmless-error review of jury instruction errors in state criminal proceedings, but ultimately about the States' authority to set the terms and conditions on which their own courts may award post-conviction remedies created by state law. The arguments advanced by the petitioner and his *amici*, if accepted by this Court, would severely curtail the States' authority over their own, state-created post-conviction review proceedings.

On the narrower question of harmless-error review, this Court "has recognized on numerous occasions, [that] some constitutional errors do not entitle the defendant to relief, particularly habeas relief." *Calderon* v. *Coleman*, 525 U.S. 141, 147 (1998). Indeed, "most constitutional errors can be harmless," and the Court has made clear that application of harmless-error review to constitutional violations "is essential to preserve the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Arizona* v. *Fulminante*, 499 U.S. 279, 306, 308 (1991). Consistent with these principles, this Court has exempted from harmless-error analysis only a limited class of violations—those that constitute "structural defect[s] affecting the framework within which the trial proceeds, rather than simply * * * error[s] in the trial process itself." *Id.* at 310.

Like other instructional errors, an instruction that violates this Court's decision in *Penry* v. *Johnson*, 532 U.S. 782 (2001) (*Penry II*), is not such a "structural" error. Indeed, this Court has consistently held that erroneous jury instructions are subject to harmless-error analysis. See, *e.g.*, *Clemons* v. *Mississippi*, 494 U.S. 738 (1990); *Carella* v. *California*, 491 U.S. 263 (1989) (*per curiam*); *Pope* v. *Illinois*, 481 U.S. 497 (1987); *Rose* v. *Clark*, 478 U.S. 570 (1986). Even a jury instruction that omits a necessary element of the offense is subject to harmless-error review, because such an instruction "does not *necessarily* render a

criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder* v. *United States*, 527 U.S. 1, 9 (1999).

Amici have a significant interest in preserving the availability of harmless-error review for sentencing instructions. Although different States employ different harmless-error doctrines, all of the *amici* believe that harmless-error review is an important and effective means to distinguish immaterial, technical violations in criminal proceedings from violations that undermine public confidence in the conviction or the sentence. *Amici* thus agree with respondent that a *Penry* error, like other jury instruction errors, is not a structural error and thus should be subject to harmless-error review.

Amici also have a strong interest in preserving the States' prerogatives to make state-authorized post-conviction relief available on terms that the States deem appropriate. While the federal Constitution gives a criminal defendant certain rights at trial and sentencing, "[n]othing in the Constitution requires the States to provide [post-conviction] proceedings." *Murray* v. *Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring); accord *Pennsylvania* v. *Finley*, 481 U.S. 551, 557 (1987). Indeed, the States have "wide discretion to select appropriate solutions" in the administration of their criminal justice systems. *Murray*, 492 U.S. at 14 (Kennedy, J., concurring). Accordingly, once a State has elected to make post-conviction relief available to criminal defendants, the State should be free to apply its own legal doctrines, consistent with due process, in addressing requests for such relief.

In short, where a prisoner seeks an order from a *state court* relieving him from incarceration on a *state criminal judgment*, *state law* should ordinarily determine the availability of that remedy. For this reason, *amici* agree with respondent that a state court may apply its own harmless-error standard in determining whether to award discre-

tionary state post-conviction relief, even if that standard may differ from the harmless-error standard that would apply in a federal habeas proceeding challenging a similar error.

STATEMENT

Fifteen years and six appeals ago, a jury convicted petitioner LaRoyce Smith of capital murder.

1. During the guilt phase of Smith's trial, the jury heard evidence establishing that Smith told two friends that he intended to rob the local Taco Bell. Smith and his friends stopped at another friend's house to get a gun, and Smith announced they were "going to hit T.B." Smith knew that 19-year-old Jennifer Soto, the shift manager, would be working at Taco Bell that night. He told one of his friends, "If she see[s] my face, I will have to kill her." *Ex parte Smith*, 185 S.W.3d 455, 457 (Tex. Crim. App. 2006).

When Smith and the others arrived at the Taco Bell, they paced outside the building for 45 minutes waiting for Soto to leave the building. According to one witness, when "things didn't go right," they all got back in the car and started to leave. But Smith was insistent, saying, "No, man, it got to be done. It got to be done." So they returned to the Taco Bell. *Ibid.*

Smith knocked on the front door and asked to use the telephone. Another employee replied that the restaurant was closed and Smith could not come in. Smith asked to see Soto. She came to the door and agreed to let Smith and two others in to use the phone. Smith hugged Soto as he entered the restaurant. 185 S.W.3d at 457-458.

After pretending to make a phone call, Smith told Soto's co-worker that "they were going to rob the place." Then Smith walked back to the office where Soto was completing her paperwork for the day. The coworker testified that he heard yelling from the office and then saw Smith holding Soto in a headlock. He was pistol-whipping her on

the head with the butt of his gun, so furiously that the handle of the gun fell off. Smith demanded to know the combination to the safe, but Soto said she did not know it. Smith paused, took a step back, and shot Soto in the back at point-blank range. Soto cried, "God, please don't let me die." *Id.* at 458.

Smith was not finished. After taking a butcher knife from the kitchen, he asked again for the combination to the safe. Again, Soto said she did not know the combination. So Smith stabbed her under her left breast, then again in her thigh, abdomen, and head. Finally, Smith "sliced her neck, severing the jugular vein." Soto died, and Smith walked out of the Taco Bell with his friends. *Ibid.*

At trial, Smith portrayed himself as an innocent bystander. He said it was one of his friends, not he, who shot and fatally stabbed Soto. In fact, Smith said, he was a "Good Samaritan" who wrested the knife from the real killer's hands. Smith told the jury he knew Soto and liked her, and he thought "no one should die the way she did." The jury believed the State's witnesses, not Smith, and convicted him of murder. 185 S.W.3d at 458-459.

2. During the penalty phase, the State presented evidence showing that Smith beat another man with a baseball bat and threatened to kill him just two days after murdering Soto. The State also showed that police officers had found ten baggies of crack cocaine in Smith's possession when they picked him up on outstanding warrants just two months before the murder. Other witnesses testified that Smith had caused problems at school, threatening teachers and perhaps carrying weapons. *Id.* at 459.

In response to the State's evidence, Smith presented 19 witnesses to support his mitigation case. Of those, fifteen character witnesses testified that Smith was a respectful, churchgoing young man who had a limited mental capacity and suffered the effects of a tragic family life. *Id.* at 459-461. According to these witnesses, Smith was not violent and encouraged his younger relatives not to make the

same mistakes he had made. Smith's witnesses also testified that he had gone to work at age fifteen or sixteen to provide for his family because his father had a drug problem and sometimes stole from them. Smith's mother told the jury she believed her son was "a good child" who could not have hurt Soto. *Id.* at 461. Finally, Smith's pastor added that Smith showed remorse about Soto's death, was capable of rehabilitation, and would not be a future danger to society. *Id.* at 459-460.

Pursuant to Texas' capital punishment statute, the trial court instructed the jury that a death sentence would be warranted only if the jury gave affirmative answers to two "special issues": (1) the murder was deliberate and (2) the defendant posed a continuing danger to others. In light of this Court's decision in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*Penry I*),[1] the trial court further instructed the jury as follows: "You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty." *Ex parte Smith*, 132 S.W.3d 407, 409 (Tex. Crim. App. 2004).

Finally, the trial court gave what has come to be known as a "nullification" instruction—that if they believed a death sentence was not warranted by the facts of the case, they should "answer at least one of the Special Issues 'No' in order to give effect to your belief that the

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[1] The Court in *Penry I* held that Texas' capital sentencing scheme was constitutional on its face but might not always provide the sentencer with a sufficient opportunity to "consider and give effect to [mitigating] evidence." 492 U.S. at 319. The Court suggested, however, that this potential problem could be remedied by "instructions informing the jury that it could consider and give effect to the mitigating evidence." *Id.* at 328.

death penalty should not be imposed due to the mitigating evidence presented to you." *Ibid.* Smith did not object to the trial court's jury instructions. 185 S.W.3d at 461. The jury answered both special issues in the affirmative, and the trial court imposed a sentence of death. *Id.* at 462.

3. On direct appeal, Smith argued that the capital sentencing statute was unconstitutional under *Penry I* because it did not allow the jury to give full effect to his mitigating evidence. The Court of Criminal Appeals rejected this argument., *Smith* v. *State*, No. 71,333 (Tex. Crim. App. June 22, 1994) (unpublished). This Court denied certiorari. *Smith* v. *Texas*, 514 U.S. 1112 (1995).

Smith then filed his first application for a writ of habeas corpus, which the Court of Criminal Appeals denied as untimely. *Ex parte Smith*, 977 S.W.2d 610 (Tex. Crim. App. 1998). Again, this Court denied certiorari. *Smith* v. *Texas*, 525 U.S. 1148 (1999).

The Court of Criminal Appeals later allowed Smith to file a second application for a writ of habeas corpus. In that application, Smith argued that the trial court's "nullification instruction" was inadequate under *Penry II*, which held that a similar instruction in another Texas capital case did not allow jurors to give effect to mitigating evidence. The Court of Criminal Appeals denied habeas relief on the grounds that (1) Smith's mitigating evidence was not the type of evidence that this Court considered in *Penry II*, and (2) in any event, the trial court's "nullification instruction" cured any *Penry* problem. 132 S.W.3d at 408-409.

4. Several months later, this Court decided *Tennard* v. *Dretke*, 542 U.S. 274 (2004), holding that the rule of *Penry II* applies to any evidence that has any tendency to mitigate the sentence. Applying that new decision, this Court reversed the Court of Criminal Appeals' decision denying habeas relief and remanded the case for further proceedings. *Smith* v. *Texas*, 543 U.S. 37 (2004) (*per curiam*). The Court rejected the Court of Criminal Appeals' conclu-

sion that Smith was not entitled to relief where he had not shown "any link or nexus" between his low intelligence or his family background and the murder. *Id.* at 43-45. Turning to the "nullification instruction," the Court concluded that "[t]here is no principled distinction, for Eighth Amendment purposes, between the instruction given to petitioner's jury and the instruction in *Penry II*. Petitioner's evidence was relevant mitigation evidence for the jury under *Tennard* and *Penry I*. We therefore hold that the nullification instruction was constitutionally inadequate under *Penry II*." Accordingly, the Court reversed the judgment of the Texas Court of Criminal Appeals and remanded the case "for further proceedings not inconsistent with this opinion." *Id.* at 48-49.

5. On remand, the Court of Criminal Appeals followed this Court's decision in *Smith* and assumed that "at least some of [Smith's] evidence was not fully encompassed by the two special issues." 185 S.W.3d at 467. Thus, the court began from the premise that "the jury charge in this case *was constitutionally deficient* under *Penry II*." *Ibid.* (emphasis added).

The court then followed the "usual method" under Texas law for assessing the impact of an error in jury instruction (185 S.W.3d at 463), a method articulated in *Almanza* v. *State*, 686 S.W.2d 157 (Tex. Crim. App. 1984). Under the *Almanza* standard, which had previously been held to apply on collateral review, the court was required to determine whether the error in the jury instruction resulted in "actual, not just theoretical, harm to the accused." 185 S.W.3d at 463-464. Moreover, where the defendant did not object to the jury instruction when it was given, the appropriate inquiry is whether "the error caused him such *egregious* harm that he did not have a fair and impartial trial." *Id.* at 464 (quotations omitted) (emphasis added).

Applying these standards, and considering the conduct of the entire trial, the Court of Criminal Appeals found the

Penry error harmless. "All of [Smith's] mitigating evidence was admitted, defense counsel did a superb job of weaving all of that evidence into a compelling theory of the case, and his attorneys presented a strong, coherent, and persuasive closing argument on punishment. We therefore conclude that [Smith] has failed to show, by a preponderance of the evidence, that the unobjected-to nullification instruction caused him 'egregious harm.'" *Id.* at 472.

SUMMARY OF ARGUMENT

The decision of the Court of Criminal Appeals should be affirmed, both on the merits, and because affirmance is necessary to preserve the States' proper authority over their own post-conviction review proceedings.

I. Constitutional errors in criminal proceedings are not automatically reversible, but are subject to harmless-error analysis unless they are "structural errors" that undermine the integrity of the entire trial. *Arizona* v. *Fulminante*, 499 U.S. 279 (1991). As this Court's decisions make clear, jury instruction errors typically are not "structural errors" and thus are subject to harmless-error review. *E.g.*, *Neder* v. *United States*, 527 U.S. 1 (1999); *Clemons* v. *Mississippi*, 494 U.S. 738 (1990); *Rose* v. *Clark*, 478 U.S. 570 (1986).

Moreover, *Penry* errors are no less amenable to harmless-error analysis than other kinds of jury instruction errors that this Court has considered. Because this Court's decisions in *Penry* and *Smith* did not foreclose the application of harmless-error review on remand, it was neither unlawful nor unreasonable for the Court of Criminal Appeals to determine whether the *Penry* error identified by this Court was harmless.

II. The Court of Criminal Appeals also acted properly in applying a state-law harmless-error standard to the erroneous jury instruction in this case. The Constitution does not require States to provide post-conviction remedies

at all. *United States* v. *MacCollom*, 426 U.S. 317 (1976) (plurality opinion). And when States choose to make such remedies available, they have wide latitude to determine the circumstances in which their own courts may award relief. *Murray* v. *Giarratano*, 492 U.S. 1 (1989); *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987).

Accordingly, state courts are not required to apply the same harmless-error standards in state post-conviction proceedings that federal courts apply in federal habeas proceedings. And for that reason, it was not error for the Court of Criminal Appeals to apply the settled Texas standard in determining whether the error previously identified by this Court was harmless.

ARGUMENT

I. The Court Below Correctly Determined That *Penry* Errors, Like Other Jury Instruction Errors, Are Subject To Harmless-Error Analysis.

Consistent with this Court's decision in *Smith* v. *Texas*, the Court of Criminal Appeals on remand started from the premise that the trial court's jury instructions were unconstitutional. The court then applied ordinary harmless-error standards to determine whether the erroneous jury instructions actually prejudiced Smith. This analysis was entirely appropriate, because *Penry* errors, like other jury instruction errors, are the kinds of "trial errors" that this Court has found susceptible to harmless-error review.

A. This Court has consistently held that jury instruction errors are subject to harmless-error review.

It is well settled that not all constitutional errors require a remedy. As this Court has made clear, "a constitutional error does not automatically require reversal of a conviction," and indeed "*most* constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). "[I]f the defendant had counsel and was tried by

an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). This presumption follows from the premise that the Constitution entitles a criminal defendant to a trial that is fair, not perfect. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986).

As this Court explained in *Fulminante*, the "common thread" among the cases in which the Court has applied harmless-error analysis is that "each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." 499 U.S. at 307-308. Such "trial errors" are distinguished from "structural defects in the constitution of the trial mechanism"—errors that "affect[] the framework within which the trial proceeds." *Id.* at 309-310. "Structural defects" include such fundamental errors as a complete deprivation of counsel at trial, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and participation of a biased trial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927).[2] The Court has emphasized that the automatic-reversal rule for "structural error" applies to only a "very limited class of cases." *Johnson* v. *United States*, 520 U.S. 461, 468 (1997); see also *Rose*, 478 U.S. at 579 ("while there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule").

Jury instruction errors typically are not among this "limited class" of "structural errors." To the contrary, this Court has consistently held that constitutional errors in

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[2] Other examples include denial of self-representation at trial, see *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); denial of a public trial, see *Waller* v. *Georgia*, 467 U.S. 39 (1984); racial discrimination in the selection of the grand jury, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); and use of a defective reasonable-doubt instruction, see *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

jury instructions are "trial errors" subject to harmless-error review. See, *e.g.*, *Washington* v. *Recuenco*, 126 S. Ct. 2546, 2553 (2006) (failure to submit a sentencing factor to the jury); *Neder* v. *United States*, 527 U.S. 1, 4 (1999) (jury instruction omitted an essential element of the offense); *Calderon* v. *Coleman* 525 U.S. 141, 145 (1998) (*per curiam*) (jury instruction overstated the governor's authority to commute a death sentence); *Clemons* v. *Mississippi*, 494 U.S. 738, 752-754 (1990) (jury instruction included overbroad definition of aggravating factors for purposes of capital sentencing); *Carella* v. *California*, 491 U.S. 263, 266 (1989) (*per curiam*) (jury instruction imposed conclusive presumptions as to essential elements of the crime); *Pope* v. *Illinois*, 481 U.S. 497, 501-504 (1987) (jury instruction improperly stated that obscenity should be judged according to community standards); *Rose*, 478 U.S. at 584 (jury instruction improperly stated that the jury could presume malice in a murder case).

In only one case has this Court held that a jury instruction constituted "structural error"—*Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). In that case, the trial court gave an instruction that allowed the jury to convict the defendant based on proof that did not meet the "reasonable doubt" standard. *Id.* at 277. This error required automatic reversal because, the Court explained, there was no constitutional verdict to which harmless-error analysis could be applied. "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Id.* at 280. The Court made clear, however, that "[i]nsofar as the possibility of harmless-error review is concerned, the jury-instruction error in this case is quite different" from other instruction errors that are subject to harmless-error analysis. *Ibid.*

Thus, under this Court's decisions, an erroneous jury instruction does not infect the entire proceeding in a way that requires automatic reversal—so long as the jury con-

victed the defendant under the proper reasonable-doubt standard. Like other "trial errors," an inappropriate jury instruction (as long as it does not misstate the ultimate burden of proof) can be "quantitatively assessed in the context of other evidence presented." *Fulminante*, 499 U.S. at 308. On direct or collateral review, a court can evaluate the actual effect of an unconstitutional jury instruction in light of the conduct of the entire trial, including all the evidence, the arguments of counsel, and other instructions given to the jury.

B. *Penry* errors should be treated the same as other jury instruction errors and subject to harmless-error review.

Penry errors, moreover, may be harmless just as other jury instruction errors may be harmless. Indeed, *Penry* errors are no more "structural" than other instruction errors that this Court has found susceptible to harmless-error analysis. And this Court has recognized that other Eighth Amendment sentencing errors may be harmless, as illustrated by the circumstances of this case.

1. On several occasions, this Court has held that jury instruction errors bearing on ultimate issues were nevertheless subject to harmless-error analysis. For example, this Court in *Neder* upheld a conviction on various fraud charges, based on harmless-error analysis, even though the trial court instructed the jury that it "need not consider" the materiality of any false statements made by the defendant. 527 U.S. at 6, 19-20. Although it was clearly unconstitutional for the trial court to withhold the materiality issue from the jury, see *United States* v. *Gaudin*, 515 U.S. 506 (1995), the Court concluded that the jury instruction was subject to harmless-error analysis: "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. Where

the defendant "was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel" and "a fairly selected, impartial jury was instructed to consider all of the evidence and argument" relevant to his defense, the Court could not say that the jury instruction error alone rendered his trial "fundamentally unfair." *Ibid.*

Similarly, the Court in *Rose* v. *Clark* concluded that it was appropriate to apply harmless-error analysis where the trial court impermissibly shifted the burden of proof on whether the defendant had acted with malice in committing two murders. 478 U.S. at 574. The trial court instructed the jury that "[a]ll homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption." *Ibid.* Even though this instruction effectively relieved the prosecutor of his burden to prove malice, this Court explained that "[r]espondent received a full opportunity to put on evidence and make argument to support his claim of innocence. He was tried by a fairly selected, impartial jury, supervised by an impartial judge. Apart from the challenged malice instruction, the jury in this case was clearly instructed that it had to find respondent guilty beyond a reasonable doubt as to every element." 478 U.S. at 579-580. "Placed in context," the Court concluded, "the erroneous malice instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction." *Id.* at 579.

Neder and *Rose* thus demonstrate that even jury instructions that effectively relieve the government of its burden of proof—a fundamental constitutional requirement that shapes the entire criminal proceeding—are not "structural errors" that require automatic reversal.

This Court's decision in *Clemons* v. *Mississippi* further confirms that an instruction that inappropriately defines factors to be considered in a sentencing proceeding is not a "structural error." The Court there held that the trial

court erred in instructing the sentencing jury that it could consider, as an aggravating factor, whether the murder was "especially heinous, atrocious, or cruel." 494 U.S. at 742. Although this formulation had been rejected as unconstitutionally vague (*Maynard* v. *Cartwright*, 486 U.S. 356 (1988)), this Court held that "it was open to the Mississippi Supreme Court to find that the error which occurred during the sentencing proceeding was harmless." 494 U.S. at 752.

If, as this Court has held, "most constitutional errors can be harmless" (*Fulminante*, 499 U.S. at 306), and if the jury instruction errors at issue in *Neder*, *Rose*, and *Clemons* could be harmless, then a *Penry* error likewise can be harmless.

2. This Court's Eighth Amendment sentencing decisions point to the same conclusion. *Penry I* represents an application of this Court's holdings in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982). As the Court explained in *Penry I*, "at the time Penry's conviction became final, it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." 492 U.S. at 318.

Yet *Lockett* and *Eddings* errors are subject to harmless-error review. For example, this Court in *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), found an Eighth Amendment violation under *Lockett* and *Eddings* where the trial court instructed an advisory jury not to consider certain mitigating evidence. *Id.* at 399. But the Court further explained: "Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. *In the absence of such a showing* our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid."

Ibid. (emphasis added). Thus, where the State *can* show that a jury instruction improperly restricting consideration of mitigating evidence was harmless, the sentence need not be disturbed.[3]

Given that *Penry I* simply followed the rules announced in *Lockett* and *Eddings*, and that *Lockett* and *Eddings* errors are subject to harmless-error review, *Penry* errors likewise must be subject to harmless-error review.

3. The circumstances in this case illustrate the reasonableness of applying harmless-error analysis to *Penry* errors. Nothing in the record here suggests that petitioner was deprived of a fair trial. He was adequately represented by counsel before an unbiased judge and a properly selected jury. He was permitted during the penalty phase to present all the mitigating evidence he wanted the jury to consider. Indeed, Smith presented 19 different mitigation witnesses, including 15 character witnesses. None of petitioner's mitigation evidence was excluded. The trial court instructed jurors that they "shall consider any evidence which, in your opinion, is mitigating," thus making clear that jurors were *required* to decide whether they thought petitioner's evidence was, in fact, mitigating and

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[3] State courts likewise have concluded that Eighth Amendment sentencing errors are subject to harmless-error analysis. *E.g.*, *Doorbal* v. *State*, 837 So. 2d 940, 959-960 (Fla. 2003) (finding a *Lockett* error harmless); *People* v. *Davis*, 706 N.E.2d 473, 488 (Ill. 1998) (following *Hitchcock* and holding that an *Eddings* error was not harmless); *State* v. *Daughtry*, 459 S.E.2d 747, 766 (N.C. 1995) (finding a *Lockett* error harmless); *Bryson* v. *State*, 876 P.2d 240, 256-257 (Okla. Crim. App. 1994) (finding an *Eddings* error harmless); *People* v. *Robertson*, 767 P.2d 1109, 1130 (Cal. 1989) (*en banc*) (citing *Hitchcock* and holding that an *Eddings* error was harmless); *People* v. *Hamilton*, 756 P.2d 1348, 1362 (Cal. 1988) (*en banc*) (citing *Hitchcock* and finding an *Eddings* error harmless); *State* v. *Eaton*, 524 So. 2d 1194, 1206 (La. 1988) (following *Hitchcock* and holding that an *Eddings* error was harmless).

if it was, whether that evidence warranted a penalty less severe than death.[4]

Given all these circumstances, it is at least possible—indeed, it is *likely*—that the *Penry* error here did not affect the jury's verdict. Jurors either did not believe petitioner's evidence was mitigating, or they believed it was mitigating but not sufficiently so to warrant a lesser sentence. Given the fact that the evidence plainly supported affirmative responses to the special issues—and thus a death sentence—there is no reason to suspect that jurors actually imposed a death sentence believing that sentence was too severe.

In sum, it cannot be said that the error in this case—instructing the jury that it should answer "No" to one or both of the special issues if it wished to impose a sentence less than death—necessarily infected "[t]he entire conduct of the trial from beginning to end" and resulted in a sentencing proceeding that was unfair to petitioner. *Fulminante*, 499 U.S. at 310. Accordingly, consistent with this Court's jury-instruction decisions from *Rose* to *Neder*, the court below treated that *Penry* error as a "trial error" susceptible to harmless-error review. That analysis was entirely appropriate, because a *Penry* error need not *necessarily* cause an unfair result.

II. The Court Below Was Constitutionally Permitted To Determine That State Habeas Relief Was Not Warranted Where The *Penry* Error Was Harmless Under The State Harmless-Error Standard.

Given that the court below correctly concluded that the *Penry* error committed in petitioner's trial was not a structural error, the court was free to deny *state* habeas relief

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[4] Indeed, this Court in *Penry I* stated that the deficiency in the special issues could be remedied by "instructions informing the jury that it could consider and give effect to the mitigating evidence." 492 U.S. at 328. The trial court's instruction here was even stronger.

on that basis. As we now show, the States have broad discretion to determine the circumstances in which post-conviction relief may be awarded, and are not required to apply federal harmless-error standards in those proceedings. The Court of Criminal Appeals acted well within its discretion in applying Texas' harmless-error standard to the constitutional error in this case.

A. States that provide post-conviction remedies have broad discretion to determine when such remedies should be awarded.

This Court has made clear that the Constitution "does not establish any right to an appeal, and certainly does not establish any right to collaterally attack a final judgment of conviction." *United States* v. *MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion) (citations omitted). In the context of direct appeals, this Court has recognized that "whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself." *McKane* v. *Durston*, 153 U.S. 684, 688 (1894). That is no less true in the context of collateral proceedings.

This Court has expressly recognized that States have broad discretion in providing post-conviction relief. For example, this Court held in *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987), that a State need not provide counsel for a prisoner seeking post-conviction relief from the State's courts. Although the Constitution guarantees the assistance of counsel through the first appeal as of right, it makes no such guarantee in the context of post-conviction proceedings—because the nature of post-conviction relief is fundamentally different from direct appellate review. As the Court explained, "[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of

his conviction." *Id.* at 556-557 (citation omitted). The States "have no obligation" to provide post-conviction relief, "and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State provide a lawyer as well. *Id.* at 557.

This holding reflects the Court's consistent view that the Constitution has little to say about the manner in which a State makes discretionary post-conviction relief available to its prisoners. Specifically, in *Finley* this Court was "unwilling to accept" the defendant's argument "that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume." *Id.* at 559. "On the contrary," the Court explained, "in this area States have *substantial discretion* to develop and implement programs to aid prisoners seeking to secure post-conviction review." *Ibid.* (emphasis added).

Applying *Finley* to capital cases, moreover, this Court has observed that "[s]tate collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989). As Justice O'Connor explained in a concurring opinion, "[a] post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings, nor does * * * the Constitution require[ ] the States to follow any particular federal model in those proceedings." *Id.* at 13 (O'Connor, J., concurring) (citation omitted). Indeed, this Court has made clear that it "do[es] not question the State's power, in post-conviction proceedings, to reallocate the respective burdens of the individual and the State and to delimit the scope of state appellate review." *Drope* v. *Missouri*, 420 U.S. 162, 174 (1975).

In sum, state post-conviction proceedings are not and need not be subject to constitutional requirements to the same extent that direct appeals are, for the States have "wide discretion to select appropriate solutions" in criminal justice matters. *Murray*, 492 U.S. at 14 (Kennedy, J., concurring) (citation and quotations omitted). Beyond minimal due process requirements, the Constitution simply does not "dictate[ ] the exact form" that a state post-conviction proceeding must take (*Finley*, 481 U.S. at 559), including the standards of review applied by state courts.

B. In their post-conviction proceedings, States are constitutionally permitted to apply, and often do apply, harmless-error standards that differ from the relevant federal standards.

The States' discretionary authority over their own post-conviction procedures and remedies logically extends to determining whether to use harmless-error review in those proceedings and, if so, which harmless-error standard to employ.

1. For example, just as federal courts apply different harmless-error standards on direct review than on collateral review, state courts must also be permitted to make the same distinction. On direct review, a federal court must apply the standard described in *Chapman* v. *California*, asking whether the government has shown that any constitutional error was "harmless beyond a reasonable doubt." 386 U.S. 18, 24 (1967). This standard does not apply, however, on habeas review. In that context, a federal court applies the standard described in *Brecht* v. *Abrahamson*, and asks whether the prisoner has shown that the constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. 619, 637-638 (1993).

Brecht itself illustrates the difference. In *Brecht*, the defendant testified at his murder trial that the shooting of his brother-in-law was accidental. *Id.* at 624. In response, the prosecutor pointed out to the jury several times that

Brecht had never made such a claim before trial. *Id.* at 624-625. The jury convicted Brecht and sentenced him to life imprisonment. *Id.* at 625. After exhausting his direct appeals, Brecht petitioned for a writ of habeas corpus, claiming that the prosecutor's comments had violated his Fifth Amendment right to remain silent, as defined by *Doyle* v. *Ohio*, 426 U.S. 610 (1976).

The question presented to this Court was whether the *Chapman* harmless-error standard applies to a *Doyle* violation on collateral review. This Court held that *Chapman* does not apply. Central to the Court's holding was the unremarkable proposition that "collateral review is different from direct review." 507 U.S. at 633. "When the process of direct review * * * comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Ibid.* (quotations omitted). Because collateral review seeks only to ensure that convictions do not violate "fundamental fairness," the rule is settled that "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on the final judgment." 507 U.S. at 634 (quotations omitted).

In addition to the basic difference between collateral review and direct review, the Court further noted "the State's interest in the finality of convictions that have survived direct review within the state court system." *Id.* at 635. The States are responsible, in the first instance, for defining and enforcing criminal laws; and in conducting criminal trials, the States are responsible, in the first instance, for vindicating constitutional rights. *Ibid.* Given the States' primary role in criminal adjudication, the Court recognized that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Ibid.* (quotations omitted). The

Court has subsequently reiterated this same point on several occasions. *E.g.*, *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991) (emphasizing the importance of respecting "the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights").

Based on these considerations, the Court held in *Brecht* that the *Chapman* standard—"harmless beyond a reasonable doubt"—was *not* appropriate for federal habeas review of state convictions. Instead, the Court asked whether the constitutional error in Brecht's case "had substantial and injurious effect or influence in determining the jury's verdict," and thus held that a federal habeas petitioner must prove "actual prejudice." 507 U.S. at 637 (quotations omitted).

In *Calderon* v. *Coleman*, the Court recognized yet another State interest warranting limited habeas review—the costs of retrials and resentencing. As this Court explained, "[t]he social costs of retrial or resentencing are significant, and the attendant difficulties are acute in cases * * * where the original sentencing hearing took place" many years earlier. 525 U.S. at 146. Accordingly, the Court concluded that "[t]he State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was *actually prejudiced* by the error." *Ibid.* (emphasis added).

The same considerations that drove the analyses in *Brecht* and *Calderon* suggest that state courts should be permitted to apply less stringent harmless-error standards in their own post-conviction proceedings. Although *Brecht* and *Calderon* did not arise from state proceedings, it is no less true here that (1) the purposes of direct review and collateral review are fundamentally different, (2) the States have an interest in the finality of judgments that have already survived direct review in their own courts, (3) state courts should be presumed to make good-faith attempts to vindicate constitutional rights at trial and

through the direct appeal process, and (4) the costs of resentencing are significant. This Court has already recognized the importance of these State interests, and the States should be free to take them into account when determining how their own courts should review final state-court judgments.

Moreover, the rationale for applying a relatively deferential standard on federal habeas review applies with even greater force to state habeas proceedings. Such proceedings are entirely creatures of state law and thus rest entirely on the authority of the State. And unlike federal habeas proceedings, state post-conviction proceedings fall outside this Court's general supervisory power.[5]

2. The principle that the States have wide discretion over State post-conviction proceedings is reflected in the wide variety of standards and procedures the States employ in determining whether post-conviction relief should be awarded. In some States, for example, relief is available by writ of habeas corpus; in others by remedies similar to the writ of coram nobis; and in others by application for statutory post-conviction relief. See generally Larry W. Yackle, *Postconviction Remedies* § 13 (1981 & Cum. Supp. 2006/2007) (describing the States' various post-

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[5] This is not to say that a federal court could apply any stricter standard on federal habeas review when a state court applies a harmless-error standard other than the federal standards. The question for the federal court is the same, namely, whether the state court's decision is "contrary to" or an "unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d). Because federal law does not provide the standard for harmless-error review in state court, a state court applying a state-created standard could not be faulted by a federal habeas court for applying that standard. *Cf. Carey* v. *Musladin*, 127 S. Ct. 649, 654 (2006) ("Given the lack of holdings from this Court" regarding a similar factual circumstance, the Court could not conclude that the state court's decision represented an unreasonable application of clearly established federal law).

conviction remedies).[6] Moreover, the substantive grounds for relief differ from State to State.[7]

Not surprisingly, the States also employ a variety of harmless-error standards. As shown in the Appendix, many States apply the federal *Chapman* standard as a matter of state law.[8] Other States apply the standard set

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[6] Compare, *e.g.*, Cal. Penal Code §§ 1473 *et seq.* (habeas corpus) with Mont. Code Ann. §§ 46-21-101 *et seq.* (coram nobis, tracking the Uniform Post-Conviction Procedure Act); Kan. Stat. Ann. §§ 60-1507 *et seq.* (coram nobis, tracking the federal motion to vacate sentence) and Ore. Rev. Stat. §§ 138.510 *et seq.* (other statutory post-conviction remedy).

[7] In Connecticut, for example, "a prisoner must demonstrate a miscarriage of justice or other prejudice and not merely an error which might entitle him to relief on appeal." *Lozada* v. *Warden*, 613 A.2d 818, 822 (Conn. 1992). In Illinois, a prisoner may petition for post-conviction relief on account of "a substantial denial" of his state or federal constitutional rights, or, in a capital case, newly discovered evidence "that establishes a substantial basis to believe that the defendant is actually innocent by clear and convincing evidence." 725 Ill. Comp. Stat. 5/122-1(a). And in New York, a prisoner may be entitled to relief for, among other things, the trial court's lack of jurisdiction; the prosecutor's knowingly offering false evidence; off-the-record prejudicial conduct; or newly discovered evidence. N.Y. Crim. Proc. Law § 440.10(1).

[8] See *Thompson* v. *State*, 2003 WL 22405385, at *2 (Alaska Ct. App. 2003); *State* v. *Corrales*, 676 P.2d 615, 627 (Ariz. 1983); *Howard* v. *State*, 2006 WL 1779506 (Ark. 2006); *Edwards* v. *People*, 129 P.3d 977, 988 (Colo. 2006); *State* v. *Castonguay*, 481 A.2d 56, 67 (Conn. 1984); *Haley* v. *United States*, 799 A.2d 1201, 1213-1214 (D.C. 2002); *Tuua* v. *State*, 2004 WL 944260, at *4 (Haw. Ct. App. 2004); *People* v. *Jimerson*, 652 N.E.2d 278, 287 (Ill. 1995); *Patton* v. *State*, 810 N.E.2d 690, 696-697 (Ind. 2004); *Morgan* v. *State*, 469 N.W.2d 419, 422 (Iowa 1991); *Taylor* v. *Commonwealth*, 175 S.W.3d 68, 72 (Ky. 2005); *Noble* v. *State*, 446 A.2d 844, 849 (Md. 1982); *Commonwealth* v. *Kartell*, 2005 WL 2739786, at *9 (Mass. Super. Ct. 2005); *Townsend* v. *State*, 646 N.W.2d 218, 223 (Minn. 2002); *Byrom* v. *State*, 927 So. 2d

forth in *Harrington* v. *California*, 395 U.S. 250, 254 (1969), under which an error will be deemed harmless if "overwhelming evidence" supports the defendant's guilt.[9] Still other States apply the *Brecht* standard, borrowed from federal habeas case law.[10]

But some States apply harmless-error standards in their post-conviction proceedings that differ from any of these federal standards. Some States have adopted by statute what amounts to a "plain error" standard, under which an error is deemed prejudicial only if it can be

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709, 730 (Miss. 2006); *State* v. *Whitfield*, 107 S.W.3d 253, 262 (Mo. 2003); *Bejarano* v. *State*, 146 P.3d 265, 268 (Nev. 2006); *State* v. *Forbes*, 119 P.3d 144, 146 (N.M. 2005); *State* v. *Zuniga*, 444 S.E.2d 443, 447 (N.C. 1994); *Hill* v. *State*, 615 N.W.2d 135, 141 (N.D. 2000); *Thomas* v. *State*, 241 N.E.2d 760, 763 (Ohio 1968); *Clayton* v. *State*, 892 P.2d 646, 653 (Okla. Crim. App. 1995); *Gibson* v. *State*, 586 S.E.2d 119, 122 (S.C. 2003); *Simon* v. *Virgin Islands*, 47 V.I. 3, 20 (V.I. Terr. Ct. 2002); *State* v. *Weed*, 666 N.W.2d 485, 495-496 (Wis. 2003); *Engberg* v. *Meyer*, 820 P.2d 70, 76 (Wyo. 1991).

[9] See *Breest* v. *Perrin*, 484 A.2d 1192, 1195 (N.H. 1984); *People* v. *Paige*, 801 N.Y.S.2d 240, 240 (N.Y. Sup. Ct. 2005); *Commonwealth* v. *Carter*, 861 A.2d. 957, 964 (Pa. Super. Ct. 2004); *Clark* v. *Ellerthorpe*, 552 A.2d 1186, 1188 (R.I. 1989).

[10] See *White* v. *State*, 729 So. 2d 909, 915 (Fla. 1999); *State* v. *Thomas*, 750 So. 2d 1114, 1126 (La. App. 1999); *Moeller* v. *Weber*, 689 N.W.2d 1, 12 (S.D. 2004); *Summers* v. *State*, 1999 WL 173977, at *5 (Tenn. Crim. App. 1999); *State* v. *Evans*, 114 P.3d 627, 636 (Wash. 2005). As the court in *Thomas* explained, "[a]pplications for post conviction relief or a writ of habeas corpus involving trial errors (not structural errors) must be decided by determining whether the error 'had substantial or injurious effect or influence in determining the jury's verdict,' not by using the harmless beyond a reasonable doubt standard of *Chapman* v. *California*, used in appeals." 750 So. 2d at 1126 (citations omitted).

shown to "affect substantial rights."[11] Other States apply a variety of other standards—such as Nebraska's "substantial miscarriage of justice" standard[12] or Alabama's "egregious error" standard.[13] And, as shown in the Ap-

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[11] See Ida. R. Crim. P. 61 (harmless error is "any error or defect in the proceeding which does not affect the substantial rights of the parties"); Kan. Stat. Ann. § 60-261 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); N.J. Ct. R. 1:7-5 ("Any error or omission which does not prejudice a substantial right shall be disregarded by the trial court before, during and after trial."); *In re Wilkinson*, 678 A.2d 1257, 1260-1261 (Vt. 1996) (in a post-conviction proceeding, error is harmless if it "does not affect the substantial rights of the parties").

[12] Neb. Rev. Stat. § 29-2308 ("No judgment shall be set aside, new trial granted, or judgment rendered in any criminal case * * * if the appellate court, after an examination of the entire cause, considers that no substantial miscarriage of justice has actually occurred"), cited in *State* v. *Nesbitt*, 650 N.W.2d 766, 795 (Neb. 2002).

[13] *Ex parte Powell*, 641 So. 2d 772, 775 (Ala. 1994) ("[P]ostconviction relief usually is available only on grounds involving egregious error, i.e., errors that are jurisdictional, constitutional, or otherwise fundamental").

For other standards, see *In re Harris*, 855 P.2d 391 (Cal. 1993) ("Only where the claimed constitutional error is both clear and fundamental, and strikes at the hear of the trial process, is an opportunity for a third chance at judicial review * * * justified"); Mich. Comp. Laws Ann. § 767.76 (no reversal unless "the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted"); *Sedler* v. *State*, 2004 ML 2523, at 12 (Mont. Dist. 2004) ("reasonable possibility" that the error "might have contributed to a conviction"); *State* v. *Davis*, 77 P.3d 1111, 1118 (Ore. 2003) ("Oregon's constitutional test for affirmance despite error consists of a single inquiry: Is there little likelihood that the particular error affected the verdict?"); *Loose* v. *State*, 135 P.3d 886, 890 (Utah App. 2006) ("An error is harmless when it is 'suffi-

pendix, a few States appear not to have adopted any particular standard.[14]

3. Because the Constitution does not "dictate[] the exact form" of state habeas proceedings (*Finley*, 481 U.S. at 559), and because the States are entitled to apply less stringent harmless-error standards on habeas review than on direct appeal, it follows that the Court of Criminal Appeals acted well within its authority when it applied Texas' own harmless-error standards—rather than federal standards—to the *Penry* error in this case.[15]

Under Texas' harmless-error standards, petitioner was required to prove that the *Penry* error "caused him such egregious harm that he did not have 'a fair and im-

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ciently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings.'"); Va. Code Ann. § 8.01-678 (no reversal "[w]hen it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached").

[14] See *Shelton* v. *State*, 744 A.2d 465, 497 (Del. Super. Ct. 2000); 15 Me. Rev. Stat. § 2125; *Pueblo* v. *Torres Rivera*, 129 D.P.R. 331, 353 (P.R. 1991); *State ex rel. Corbin* v. *Haines*, 624 S.E.2d 752, 759 (W. Va. 2005).

[15] As Texas demonstrates (at 44-49), the decision below thus rests on an independent and adequate state ground, and for that reason the petition should be dismissed for want of jurisdiction. But even if the Court believes it has jurisdiction, it may wish to consider dismissing the petition as improvidently granted. The petition for certiorari is written as though this Court would ultimately decide whether the *Penry* error in this case was harmless as a matter of federal law. See Petition at i, 17-23. As we have shown, that assumption is false: The court below acted within its authority in applying the Texas harmless-error standard rather than any federal standard. Nevertheless, the States would benefit from a written opinion reaffirming their authority to apply their own harmless-error standards in their own post-conviction proceedings.

partial trial.'" 185 S.W.3d at 464. In other words, as this Court noted in *Brecht*, petitioner was required to show "actual prejudice." 507 U.S. at 637; accord *Calderon*, 525 U.S. at 146 ("the court must find that the defendant was actually prejudiced by the error").

This standard accomplishes the same purposes for the State of Texas that the "plain error" standard accomplishes for the United States. Under federal law, "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). This is a stricter standard than the standard applied to harmless error that is preserved at trial. See Fed. R. Crim. P. 52(a). Indeed, this Court has interpreted Rule 52(b) to mean that a "[c]ourt of [a]ppeals should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 736 (1993) (quotations omitted).

The *Almanza* standard that the Court of Criminal Appeals applied is similar. Where a party fails to object to a trial error—even a constitutional error—the "usual method" is to demand from the party claiming error a more compelling demonstration of prejudice. 185 S.W.3d at 463.[16] Had the court on direct appeal found an error, it would have applied this standard to determine whether reversal was appropriate. Because the court on habeas review is entitled to demand an even greater showing of prejudice from the prisoner, it was entirely appropriate for the court below to apply the *Almanza* rule here.

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[16] As Texas explains (at 23-24), the *Almanza* standard is even more favorable to the prisoner than the *Olano* standard, because a state court applying *Almanza* must grant relief if the prisoner makes the required showing of prejudice, whereas a federal court applying *Olano* has *discretion* to notice a plain error.

* * * * *

The Court of Criminal Appeals began its analysis with the assumption—based on this Court's decision in *Smith*—that the jury instructions given in this case violated *Penry*. Consistent with this Court's general rule that jury instruction errors are subject to harmless-error analysis, the court then asked whether the *Penry* error actually prejudiced petitioner. And consistent with settled harmless-error standards under Texas law, the court asked specifically whether the *Penry* error—to which petitioner did not object at trial—caused petitioner "such egregious harm that he did not have a fair and impartial trial." That approach is entirely consistent with the federal Constitution and with the States' authority to create and manage their own post-conviction proceedings in a manner that they believe will best serve the interests of all their citizens.

CONCLUSION

The decision below should be affirmed, or the petition dismissed.

Respectfully submitted.

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APPENDIX

APPENDIX

SUMMARY OF HARMLESS-ERROR STANDARDS IN STATE POST-CONVICTION PROCEEDINGS*

Chapman / Harmless Beyond a Reasonable Doubt	*Harrington* / Overwhelming Evidence Supports Verdict	*Brecht* / Substantial and Injurious Effect	Error Affects Substantial Rights	Other Deferential Standards	Undefined Standards
Alaska	New Hampshire	Florida	Idaho	Alabama	Delaware
Arizona	New York	Louisiana	Kansas	California	Georgia
Arkansas	Pennsylvania	South Dakota	New Jersey	Michigan	Maine
Colorado	Rhode Island	Tennessee	Vermont	Montana	Puerto Rico
Connecticut		Washington		Nebraska	West Virginia
District of Columbia				Oregon	
Hawaii				Texas	
Illinois				Utah	
Indiana				Virginia	
Iowa					
Kentucky					
Maryland					
Massachusetts					
Minnesota					
Mississippi					
Missouri					
Nevada					
New Mexico					
North Carolina					
North Dakota					
Ohio					
Oklahoma					
South Carolina					
Virgin Islands					
Wisconsin					
Wyoming					

* This summary shows the various standards that state courts have applied in post-conviction proceedings. Some States' courts may apply more than one of the harmless-error standards identified here.

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(9)

No. 05-11304

IN THE

Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

v

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE CONSTITUTION PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Fallon, Richard, Jr., et al., *Hart and Wechsler's The Federal Courts and The Federal System* (5th ed. 2003) 13
Stern, Robert L., et al., *Supreme Court Practice* (8th ed. 2002) 5
Warren, Charles, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 (1930) 14
Warren, Charles, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1 (1913) 12, 13

IN THE

Supreme Court of the United States

No. 05-11304

LAROYCE LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Amicus curiae The Constitution Project respectfully submits this brief in support of the petition for a writ of certiorari.[1]

INTEREST OF AMICUS CURIAE

The Constitution Project is a bipartisan non-profit organization that seeks solutions to contemporary constitutional issues through a combination of scholarship and public education. The Project's essential mission is to promote constitutional dialogue. To that end, it creates bipartisan blue-ribbon committees comprised of former government officials, judges, scholars, and other prominent citizens to reach across ideological and partisan lines. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and with ensuring that those guarantees are respected and enforced by all three branches of govern-

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this amicus brief have been submitted to the Clerk.

ment. More specifically, the Project recognizes this Court's role as the ultimate arbiter of the meaning of those constitutional guarantees.

In May 2000, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others. Although the Initiative does not take a position on the death penalty, it is concerned that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness. In 2006, the Initiative released an updated version of its 2001 report and consensus recommendations. *Mandatory Justice The Death Penalty Revisited* describes 32 reforms that the committee believes are essential to reduce the risk of wrongful capital convictions and executions.

This Court's decision in *Smith* v. *Texas*, 543 U.S. 37 (2004), addressed and reinforced one of the most important procedural protections for capital defendants: the ability to present all relevant mitigating evidence to the jury and have the jury consider that evidence. Recommendations 26 and 27 in *Mandatory Justice* describe the Death Penalty Initiative committee's belief in the importance of mitigating factors in the jury's decision-making process. By disregarding the plain import of this Court's decision in *Smith*, the decision of the Texas Court of Criminal Appeals on remand threatens to eviscerate that essential protection. More broadly, it threatens this Court's authority as the final judicial arbiter of federal constitutional law. The Constitution Project therefore urges that the petition for certiorari be granted.

INTRODUCTION

In 1869, this Court reversed the Supreme Court of Missouri in a case involving a dispute over a parcel of land from the Louisiana Purchase. *Maguire* v. *Tyler*, 75 U.S. (8 Wall.) 650, 668 (1869). The Court found that the land in question had been granted by the Spanish governor to plaintiff John

Magwire's assignor, and had been properly confirmed by federal commissioners. *Id.* at 653-654, 660. On remand, the Missouri court conceded that this Court had decided the question of title in favor of Magwire, but refused to give effect to the judgment. *Magwire* v. *Tyler*, 47 Mo. 115, 125-126, 129 (1870). Instead, the court dismissed Magwire's action on a state-law ground that had not previously been raised. *Id.* at 126-128. On a second writ of error, this Court affirmed its jurisdiction and again reversed the Missouri court, explaining:

> State courts have no power to deny the jurisdiction of this court in a case brought here for decision and sent back with the mandate of the court, which is its judgment. . . . [I]t is clear that it was too late to raise any [additional] question after the whole case had been decided and the cause remanded for final judgment.

Tyler v. *Magwire*, 84 U.S. (17 Wall.) 253, 284-285 (1872).

As *Magwire* illustrates, throughout this nation's history, this Court has confronted cases in which a state or lower federal court has contravened this Court's direction—either openly or through evasive maneuvers such as those employed in *Magwire*. In such cases, this Court has repeatedly asserted its authority to protect the integrity of its mandate and, ultimately, the supremacy of federal law.

Here, once again, a state court has failed to heed this Court's dictates, and this Court should grant review to reaffirm that its decisions must be followed.

Petitioner LaRoyce Lathair Smith was convicted of capital murder in Dallas County, Texas. At sentencing, he presented evidence that he had learning disabilities and a low IQ; that his father was a violent drug addict; and that he was only nineteen when he committed the crime. The jury was instructed to answer two "special issues": whether the murder was deliberate, and whether the defendant was likely to be dangerous in the future. Under Texas law, affirmative answers to those two questions mandated the

death penalty. In an effort to comply with this Court's decision in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), the judge gave a supplemental "nullification" instruction directing the jury that it could respond to petitioner's mitigating evidence by answering "No" to one of the two special issues, even if the evidence otherwise required an affirmative answer. The jury answered "Yes" to both special issues and sentenced petitioner to death. The Texas Court of Criminal Appeals rejected petitioner's request for postconviction relief, reasoning that his mitigating evidence was not constitutionally significant and that the nullification instruction provided a sufficient vehicle for the jury to consider the evidence. *Ex parte Smith*, 132 S.W.3d 407, 413-417 (Tex. Crim. App. 2004); *see Smith* v. *Texas*, 543 U.S. 37, 37-38 (2004) (per curiam) (describing proceedings below).

This Court reversed the Texas Court of Criminal Appeals. *Smith* v. *Texas*, 543 U.S. 37. Finding that petitioner's evidence was relevant for mitigation purposes, it criticized the Texas court for failing to follow the "plain" meaning of the Court's precedent and for relying "on a test we never countenanced and now have unequivocally rejected." *Id.* at 45 (citing *Tennard* v. *Dretke*, 542 U.S. 274 (2004)). It held that the jury instructions at petitioner's trial were "constitutionally inadequate" because they did not allow jurors to give appropriate consideration to that mitigating evidence. *Id* at 48. The Court explained that "petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And . . . the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Id.* It therefore reversed and remanded for further proceedings not inconsistent with its opinion. *Id* at 48-49.

Yet, on remand, the Texas Court of Criminal Appeals disregarded this Court's analysis. It interjected a new procedural obstacle to Smith's federal claim—one that it had previously declined to impose—and it justified the applica-

tion of that obstacle by reverting to a line of reasoning that this Court had specifically rejected *Ex parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006). It once again questioned the relevance of petitioner's mitigation evidence, *id.* at 464-466, and, applying the state's harmless error standard, concluded that the nullification instruction provided an adequate vehicle through which the jury could consider that evidence, *id.* at 468-472. The resulting decision not only is inconsistent with this Court's guidance on the precise question at issue: even more seriously, it undermines the constitutional authority of the Court.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Texas Court of Criminal Appeals, pursuant to Supreme Court Rule 16. In the alternative, the Court should grant plenary review and set the case for briefing and argument. It is critically important that this Court review the Texas court's decision, for two related reasons.

First, the decision of the Texas Court of Criminal Appeals contravenes this Court's opinion and mandate, disregarding the Court's carefully reasoned conclusions regarding the constitutional inadequacy of the jury nullification instruction. Summary reversal is appropriate to vindicate the concerns that warranted the Court's original grant of certiorari and to correct the Texas court's failure to heed this Court's clear direction. *See, e g , Sumner* v. *Mata*, 455 U.S. 591, 596-597 (1982) (granting certiorari and summarily vacating and remanding where the lower court "apparently misunderstood the terms of our remand" and reached a result inconsistent with the Court's prior opinion); Robert L. Stern et al., *Supreme Court Practice* 322 n.101 (8th ed. 2002) ("Summary reversal may . . . be grounded on the inherent power of the Court . . . to insure compliance with its own remand orders.").

Second, this Court should grant review, as it has done repeatedly throughout its history, to affirm its authority un-

der the Supremacy Clause to prevent state and lower federal courts from evading or frustrating its plain direction. Since the early days of the Republic, the Court's resolve when faced with state and lower court resistance to compliance with its mandates has been essential to maintaining its authority. Firmness is no less important in this instance.

I. THE TEXAS COURT OF CRIMINAL APPEALS' DECISION CONTRAVENES THIS COURT'S REASONED ANALYSIS IN *SMITH*

1. When this case was last here, the Court held unambiguously that the jury instructions at the penalty phase of petitioner Smith's trial were "constitutionally inadequate" because they disabled the jury from considering his extensive mitigating evidence. *Smith* v. *Texas*, 543 U.S. 37, 48 (2004) (per curiam). Nevertheless, the Texas Court of Criminal Appeals on remand applied its state harmless-error standard to reject petitioner's federal constitutional claim, on the theory that the jury instructions did in fact provide an adequate vehicle through which the jurors could consider petitioner's evidence. According to the court, the petitioner failed to show "egregious harm" because he failed "to provide any persuasive argument that the jury was unable to consider the totality of his extensive mitigating evidence." *Ex parte Smith*, 185 S.W.3d 455, 471 (Tex. Crim. App. 2006). In so holding, the court on remand disregarded this Court's specific findings and contravened the clear import of its decision in two critical ways.

First, the Texas court ignored this Court's finding that petitioner's mitigation evidence did not fit "within the scope of the special issues" in such a way that the jurors could properly consider and give effect to that evidence. *Smith*, 543 U.S. at 46 (quoting *Penry* v. *Johnson*, 532 U.S. 782, 799-800 (2001) (*Penry II*)); *see id* at 47-48. Although the Texas court acknowledged that the "analytical framework" it had used in concluding that "the jury could fully address this evidence within the confines of the two special issues" had been repudiated by this Court in *Tennard* v. *Dretke*, 542

U.S. 274 (2004), it professed to be "uncertain whether the Supreme Court also concluded that some of the applicant's mitigation evidence was outside the reach of the two special issues, and, if so, exactly what evidence was beyond the ambit of those special issues." *Ex parte Smith*, 185 S.W.3d at 464; *see also id.* at 466.[2] Accordingly, it proceeded to "reexamine" petitioner's mitigation evidence and concluded that almost all such evidence was, in fact, "encompassed under the 'future dangerousness' special issue," with the remainder likely covered by deliberateness. *Id.* at 465-466; *see also id.* at 472.[3]

That reasoning flatly contradicts this Court's analysis. In *Smith*, this Court did *not* leave open the question whether the special issues fully encompassed petitioner's mitigation evidence. Rather, it made perfectly clear that the special issues were inadequate. After carefully reviewing the particular mitigation evidence in question, 543 U.S. at 41, 44-45, it concluded that, "[j]ust as in *Penry II*," the questions regarding "deliberateness and future dangerousness . . . had little, if anything, to do with the mitigation evidence petitioner presented," *id.* at 48. The jury instruction, including the special questions, was "constitutionally inadequate," *id*, because it did not "empower the jury with a ve-

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[2] While repeatedly professing its uncertainty about this Court's holding regarding the special issues, *Ex parte Smith*, 185 S W 3d at 464, 466-467, the Texas court elsewhere declared that "the Supreme Court did *not* address our conclusion that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence," *id* at 463 (emphasis added) (internal quotations omitted) As discussed in text, this statement disregards this Court's plain holding that the special issues were inadequate to permit the jury to give effect to petitioner's evidence *See Smith*, 543 U S at 47-48

[3] The Texas court then purported to assume "for the sake of argument, that at least some of the applicant's evidence was not fully encompassed by the two special issues" *Ex parte Smith*, 185 S W 3d at 466-467 Yet, even after this ostensible concession, the court insisted, at the close of its opinion, that it was merely "possible" that "the two special issues may not have fully and completely encompassed every single bit" of the evidence *Id* at 472.

hicle capable of giving effect to that evidence," *id.* at 45. In concluding otherwise, the Texas court ignored this Court's specific finding.

Second, the Texas Court of Criminal Appeals disregarded this Court's holding that the nullification instruction given to the jurors left them in an impermissible ethical dilemma. As this Court explained in *Smith*, it would have been "both logically and ethically impossible for a juror to follow both" the instructions relating to the special issues and the instructions relating to mitigating evidence. 543 U.S. at 46 (quoting *Penry II*, 532 U.S. at 799). "Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a 'true verdict.'" *Id.* (quoting *Penry II*, 532 U.S. at 800). Furthermore, for Eighth Amendment purposes, the jury instruction in *Smith* was indistinguishable from the one the Court had previously ruled unconstitutional in *Penry II*: "[T]he clearer instruction given to petitioner's jury did not resolve the ethical problem .... To the contrary, the mandatory language in the charge could possibly have intensified the dilemma faced by ethical jurors.... [T]he 'jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence.'" *Id* at 47-48 (quoting *Penry II*, 532 U.S. at 801).

This Court thus held that, on these facts, the nullification instruction did not allow the jurors to give consideration and effect to the mitigating evidence. But, on remand, the Texas Court of Criminal Appeals did not heed that conclusion. Although it paid lip-service to the Court's conclusion that "the nullification instruction intensified the dilemma faced by ethical jurors in this case," it went on to dismiss the ethical dilemma as a mere "possibility," insufficiently real to warrant granting petitioner a new penalty trial. *Ex parte Smith*, 185 S.W.3d at 468 (internal quotations omitted). According to the Texas Court, there was no "actual" ethical dilemma because neither the jurors, the parties, nor the trial judge noted one, and during voir dire the jurors "[o]verwhelmingly . . . agreed" that they understood and

could follow the nullification procedure. *Id.* Moreover, "the prosecutor never suggested that the jury should ignore or fail to consider any of [petitioner's] mitigation evidence," *id.* at 471, and "[a]ll of [petitioner's] mitigating evidence was admitted, defense counsel did a superb job of weaving all of that evidence into a compelling theory of the case, and his attorneys presented a strong, coherent, and persuasive closing argument on punishment," *id.* at 472.

None of the factors on which the Texas court relied can justify its disregard of this Court's express holding that, on these facts, the nullification instruction was constitutionally inadequate. The Texas court's reliance on jurors' statements during voir dire ignores this Court's holding that, by its very nature—even if jurors clearly understood it—the nullification instruction placed jurors in an intractable bind: it would have been "logically and ethically impossible" to comply both with the nullification instruction and their oath to render a true verdict on the special issues. *Smith*, 543 U.S. at 46 (quoting *Penry II*, 532 U.S. at 799). The notion that the prosecutor's closing mitigated this dilemma contradicts this Court's finding that the prosecutor heightened the jurors' ethical dilemma when he "reminded the jury that each and every one of them had promised to 'follow the law' and return a 'Yes' answer to the special issues so long as the State met its burden of proof." *Id* at 48 n.5. And the Texas court's assertion that petitioner suffered no egregious harm from the deficient instructions because he presented a "compelling" and "persuasive" case on mitigation gets it precisely backwards: as this Court recognized, petitioner was harmed *because* he presented powerful mitigating evidence and the jury had no adequate vehicle to give effect to that evidence.

As this Court explained in *Tennard*, "the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." 542 U.S. at 285 (internal quotations omitted); *see also Penry II*, 532 U.S. at 797. State and lower courts may not evade this principle by imposing a "restrictive gloss" on the Court's precedent. *See Tennard*, 542 U.S. at 283. But that is exactly

what the Texas court did here, undermining this Court's repeated holdings regarding the relevance of mitigation evidence and the inadequacy of the nullification instruction.

2. The Texas Court of Criminal Appeals' invocation of state harmless-error law does not authorize or excuse its failure to abide by this Court's decision. According to the Texas court, application of the "egregious harm," rather than "some harm," standard was appropriate because petitioner failed to raise his claim of jury-charge error at the trial level. *See Ex parte Smith*, 185 S.W.3d at 463-464, 468 (citing *Almanza* v. *State*, 686 S.W.2d 157 (Tex. Crim. App. 1984)). Yet, the Texas Court of Criminal Appeals had twice before rejected the argument that petitioner failed to preserve his jury charge claim, and had previously addressed the merits of the claim without imposing any procedural barriers. *See Smith* v. *State*, No. 71,333 (Tex. Crim. App. June 22, 1994); *Ex parte Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004).[4] Indeed, this Court, when first reversing the Texas court, expressly noted that the majority had declined to find petitioner's claim procedurally defaulted and had instead decided it on the merits. *Smith*, 543 U.S. at 43 n.3. Only after the Texas Court of Criminal Appeals received an unfavorable ruling on the merits from this Court did it devise a theory of unpreserved error.

This Court has repeatedly refused to permit state courts to apply a state-law procedural ground for the first time on remand in order to evade this Court's rulings on a question of federal constitutional law. *See, e g , NAACP* v.

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[4] In any event, there is no basis for the Texas court's contention that petitioner failed to raise his objection to the jury instructions in a timely fashion In fact, as the court itself acknowledged, petitioner made a timely claim that the special issues failed to permit full consideration of his mitigating evidence, and in doing so he explicitly invoked *Penry I Ex parte Smith*, 185 S W.3d at 461 n 8 Petitioner's objection was clearly sufficient to apprise the trial court of his federal constitutional claim *See id* at 475-476 (Holcomb, J , dissenting "[T]he majority's reasoning that petitioner did not preserve error cannot be countenanced, and further, it is not supported by the record " *Id* at 475

Alabama ex rel Patterson, 360 U.S. 240, 244-245 (1959) (citing *Sibbald* v. *United States*, 37 U.S. (12 Pet.) 488, 492 (1838)); *Tyler* v. *Magwire*, 84 U.S. (17 Wall.) 253, 284-285 (1872). Nor can courts inconsistently employ a state procedural rule as a means to thwart this Court's review. *See, e.g., NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 456, 457-458 (1958).

Moreover, even assuming that the Texas Court of Criminal Appeals could, at this late date, invoke the state's "egregious harm" standard to deny petitioner relief, under no circumstances could it apply the standard in a way that contravenes the essential holding of this Court. Yet, that is precisely what the Texas court did here. It reasoned that petitioner suffered no egregious harm *because* the jury was able to consider most, if not all, of the evidence. *Ex parte Smith*, 185 S.W.3d at 471-472. The Texas court's harmless-error ruling was therefore premised on its judgment that the special questions and nullification instruction together provided an adequate vehicle for the jurors to give effect to the mitigation evidence—a judgment that directly conflicts with this Court's holding. *See Smith*, 543 U.S. at 38, 48.[5]

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[5] The concurring opinion's assertion that the egregious harm standard constitutes an independent and adequate state-law ground and therefore deprives this Court of jurisdiction is without merit *See Ex parte Smith*, 185 S W 3d at 472-473 (Hervey, J , concurring) A state-law ground is not independent where it is either "interwoven" with the federal ground "or is not of sufficient breadth to sustain the judgment without" the use of federal law *Michigan* v *Long*, 463 U S 1032, 1039 n 4 (1983) (quoting *Enterprise Irrigation Dist* v *Farmers Mutual Canal Co* , 243 U S 157, 164 (1917)) The Texas court's conclusion that petitioner failed to show egregious harm was necessarily "interwoven" with federal constitutional law because the error being assessed—by whatever standard—was federal constitutional error And, as explained above, the Texas court's conclusion that the federal constitutional error at issue failed to meet an egregious-harm standard was entirely dependent on an analysis of the effects of that error that revisited and distorted the analysis previously conducted by this Court As a result, it cannot be considered an independent state-law ground *See Oregon* v *Guzek*, 126 S Ct 1226, 1229-1230 (2006) (no independent ground where state court relied upon Supreme Court mitigation precedents to determine admissibility of evi-

II. THIS CASE MERITS THE SAME TREATMENT AS PAST CASES IN WHICH THIS COURT HAS REVERSED STATE COURTS THAT ATTEMPTED TO THWART ITS MANDATES

Over the course of the last two hundred years, this Court has often granted review of state and lower federal court decisions that have thwarted, evaded, or simply misapprehended its mandates, in order to reaffirm its authority "to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958). The Court should do the same here.

1. When the Court was first established in 1790, it was by no means settled that its judgments would be respected as binding on state courts. Indeed, in the early years of the Republic, state courts repeatedly resisted this Court's authority to review their judgments on matters of federal law. *See* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1,

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dence), *Harper* v *Virginia Dep't of Taxation*, 509 U S 86, 100 (1993) (no independent or adequate ground where state law holding "rested solely" on a failure properly to apply federal law), *Ake* v *Oklahoma*, 470 U S 68, 75 (1985) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law ").

Moreover, even if the "egregious harm" standard were an "independent" ground, it would not be an "adequate" ground Procedural rules that are applied inconsistently, as in this case, will not divest this Court of jurisdiction *See James* v *Kentucky*, 466 U S. 341, 348-349 (1984) (only "firmly established and regularly followed state practice can prevent implementation of federal constitutional rights"), *Barr* v *City of Columbia*, 378 U S 146, 149 (1964) (state procedural rules "not strictly or regularly followed" may not bar review), *NAACP* v *Alabama ex rel Patterson*, 357 U S at 457-458 ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights "). Here, as Justice Holcomb explained in dissent, the Texas court applied its preservation of error rule "capriciously and arbitrarily" to deny relief to petitioner despite his objection at trial that the jury instructions failed to comply with *Penry I*, and despite its previous decisions to address petitioner's claim on the merits *Smith*, 185 S W 3d at 477-478

161 (1913); Richard Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 479-480 (5th ed. 2003). Only as a result of this Court's resolve in the face of state-court resistance was its supremacy in matters of federal law established.

In the most notorious dispute of this Court's early years, Virginia's highest court refused to acknowledge the authority of the Court to review a decision construing the effect of a post-Revolutionary War treaty on the rights of two purported landowners. *See Hunter* v. *Fairfax's Devisee*, 15 Va. (1 Munf.) 218 (1810), *vacated*, *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813), *remanded to Hunter* v. *Martin*, 18 Va. (4 Munf.) 1 (1815), *rev'd*, *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). According to the Virginia court, section 25 of the Judiciary Act,[6] which conferred upon this Court the authority to exercise appellate jurisdiction over state courts, was unconstitutional. *Hunter*, 18 Va. at 58-59. Thus, the state court refused to follow this Court's express instructions to enter judgment for the devisee of the British subject whose land had been confiscated in violation of a federal treaty. *Id.* In response, this Court did not yield; instead, it issued another decision affirming its authority and renewed its order to the Virginia court to comply with its first mandate *Martin*, 14 U.S. 304. As the Court made clear, its final judgments are "conclusive upon the parties, and [cannot] be re-examined" either by the Court itself or by state courts. *Id* at 355.

In the years following *Martin*, as state courts continued to resist this Court's judgments, the Court repeatedly made clear that its decisions on matters of federal law were binding and must be followed. *See* Warren, *supra*, at 12-22, 25, 161-162, 129-186 (detailing state-court resistance to the Court's authority); *see also Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (reaffirming the authority of the Court to review state-court judgments). For example, the Court repeatedly reversed state courts that issued writs of manda-

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[6] Judiciary Act of 1789, 1 Stat 73, 85 (1789)

mus and habeas corpus to federal officials, or that tried to prevent the execution of federal writs. *See* Charles Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 350-356 (1930); *see also M'Clung* v. *Silliman*, 19 U.S. (6 Wheat.) 598 (1821) (states have no right to issue a writ of mandamus to a federal official); *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166, 195 (1867) (states lack "all power to restrain either the process or proceedings in the national courts"). As the Court declared in *Amy* v. *Desmoines County Supervisors*, if state courts had the power to prevent the execution of a federal writ of mandamus, "the Constitution of the United States, and the laws made in pursuance thereof . . . would be subordinated to the authority of the courts of every State in the Union." 78 U.S. (11 Wall.) 136, 138 (1870).

In a case involving the Fugitive Slave Act,[7] the Court acted no less than four times in order to stop the Supreme Court of Wisconsin from discharging a federal prisoner in violation of this Court's mandate. *Ableman* v. *Booth*, 62 U.S. (21 How.) 506, 513-525 (1859), *reversing In re Booth*, 3 Wis. 1 (1854), *Ex parte Booth*, 3 Wis. 145 (1854). The Court made clear in its final judgment in the case that

> no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a State court where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the State.

Id. at 525; *accord Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872).

2. As a result of these repeated exertions during the early years of the Republic, this Court's authority to review state-court judgments on matters of federal law was, by the

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[7] The Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462

twentieth century, firmly established. Nonetheless, on numerous occasions during the last century, state courts, as well as lower federal courts, have ignored, evaded, or misapplied this Court's mandates and its guidance regarding the proper application of federal law. The cases cover a wide array of legal issues, from the federal constitutional rights of criminal defendants, *see, e g , Miller-El* v. *Dretke*, 125 S. Ct. 2317 (2005), to a corporation's right to assert in a federal forum its entitlement to arbitration, *General Atomic Co* v. *Felter*, 436 U.S. 493 (1978) (per curiam). And the lower and state court decisions at issue have ranged from the overtly disobedient, *see, e g , Deen* v. *Hickman*, 358 U.S. 57 (1958) (per curiam), to the covert, devious, or simply wrongheaded, *see, e g , NAACP* v. *Alabama ex rel Patterson*, 360 U.S. at 244-245. Yet, whatever the legal issue or the manner of the lower courts' failure to abide by this Court's decisions, this Court has taken decisive action to protect the integrity of its mandates and to affirm its authority as the ultimate arbiter of federal law.

The maneuvers used by the Texas Court of Criminal Appeals to evade this Court's decision in *Smith* bear a striking resemblance to tactics of resistance that the Court has repeatedly discountenanced in the past. On numerous occasions, courts have applied new procedural grounds on remand—as the Texas court did here—in order to reinstate a ruling this Court had set aside. For example, in *NAACP* v. *Alabama ex rel. Patterson*, this Court reversed a decision of the Supreme Court of Alabama that upheld a judgment of civil contempt against the NAACP for failing to comply with a court order to reveal the names of its members. 357 U.S. 449, 467 (1958). On remand, the state court acknowledged this Court's holding, but then proceeded to re-institute its contempt order on a new ground, based on a different view of the record. *Ex parte NAACP*, 268 Ala. 531, 532-533 (1959). On certiorari, this Court again reversed, explaining that the state court could not employ a new rationale on remand to evade the Court's mandate. *NAACP* v. *Alabama ex rel Patterson*, 360 U.S. at 244-245 (quoting *Sibbald*, 37

U.S. (12 Pet.) at 492); *see also Tyler* v. *Magwire*, 84 U.S. (17 Wall.) at 284-285.

Similarly, in *Sullivan* v. *Little Hunting Park, Inc*, this Court vacated and remanded a decision of the Virginia Supreme Court of Appeals holding that petitioner's failure to comply with a state procedural requirement barred review of his racial discrimination claim. 392 U.S. 657 (1968). On remand, the Virginia court again asserted that the state procedural ground barred review of petitioner's claim. 209 Va. 279, 281 (1968). Faced with that attempt to evade the import of its prior ruling, this Court again granted review and reversed. 396 U.S. 229, 232, 234 (1969). More recently, in *Ford* v. *Georgia*, the Court vacated and remanded a decision of the Georgia Supreme Court rejecting the petitioner's claim of discriminatory jury selection. 479 U.S. 1075 (1987). On remand, the Georgia court for the first time held that petitioner's claim was procedurally barred. 257 Ga. 661, 663-664 (1987). Rather than permit the Georgia court thus to avoid the effect of its prior decision, this Court granted certiorari and reversed. 498 U.S. 411, 424-425 (1991).[8]

The Texas Court of Criminal Appeals engaged in similar sleight-of-hand here. When petitioner's case was first before the Texas court, the State argued that his claim was procedurally barred, but the majority declined to rule on that ground and instead addressed the merits; nowhere did the majority intimate that petitioner had failed to raise his claim in a timely fashion. *See Smith*, 543 U.S. at 43 n.3; *Ex parte Smith*, 132 S.W.3d at 410; *cf Ex parte Smith*, 132 S.W.3d at 423 (Hervey, J., concurring). Rather, it was only after receiving an unfavorable decision on the merits from this Court that the Texas court first invoked petitioner's pur-

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[8] The Court held in both *Sullivan* and *Ford* that the purported state-law ground of decision did not deprive this Court of jurisdiction because the state court had not consistently applied it and it therefore was not an adequate state ground *See Sullivan*, 396 U S at 234, *Ford*, 498 U S at 423-424 In this case, as demonstrated above, *see supra* n 5, the purported state-law ground for the Texas court's decision is neither independent nor adequate

ported untimeliness to deny relief. This Court has repeatedly refused to permit state courts to evade its rulings by manipulating state procedural law in this manner.

In other cases, the Court has reversed state or lower federal courts a second time when, on remand, they refused to accept that the Court meant what it said initially. *See, e.g., General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (per curiam) (involving entitlement to arbitration); *Stanton* v. *Stanton*, 429 U.S. 501 (1977) (per curiam) (involving sex discrimination in Utah family-law statute); *Deen* v. *Hickman*, 358 U.S. 57 (1958) (per curiam) (involving sufficiency of evidence to support a jury award in a Federal Employers Liability Act case). The Court has made clear that it is not enough to pay lip service to its rulings while disregarding them in substance; the court to which this Court remands a case must respect the "thrust" of the Court's decision. *See Stanton*, 429 U.S. at 503. Accordingly, this Court has not only corrected instances of outright disobedience, where the state court does "precisely what [the Court] held that it lacked the power to do," *Felter*, 436 U.S. at 496, or undertakes "its own independent evaluation of the evidence . . . wholly apart from the judgment of the Supreme Court," *Deen*, 358 U.S. at 57; it has also refused to allow state and lower courts to evade its judgments on remand based on an unduly narrow reading of this Court's case law, or on implausible distinctions between the facts of their cases and the precedents upon which a remand order was based.

In *Henry* v. *City of Rock Hill*, for example, this Court vacated and remanded a decision of the South Carolina Supreme Court that upheld the criminal convictions of individuals peacefully "assembled . . . in front of the City Hall to protest segregation." 376 U.S. 776, 777 (1964) (per curiam) (describing prior decision in 375 U.S. 6 (1963)). On remand, the state court purported to comply with this Court's mandate. *City of Rock Hill* v. *Henry*, 135 S.E.2d 718, 718-719 (S.C. 1963). Yet, much like the Texas Court of Criminal Appeals in *Smith*, the court professed uncertainty about the true meaning of the Court's precedent and adopted an un-

duly narrow reading of the case law. *Id.* at 718-720; *cf Ex parte Smith*, 185 S.W.3d at 464, 466-467, 469-472 (misstating and dramatically narrowing this Court's holding in *Smith*). Then, after unpersuasively distinguishing the facts of its case from the precedent upon which remand was based, the court concluded that its original judgment should stand. *Henry*, 135 S.E.2d at 719-720; *cf Ex parte Smith*, 185 S.W.3d at 469-472.[9]

This Court again granted certiorari and reversed. *Henry*, 376 U.S. at 778. In a terse opinion, the Court made clear that such manipulation of its precedent would not be countenanced. As the Court explained, "under the Supremacy Clause," Supreme Court decisions are "binding upon state courts as well as upon federal courts," and although the Court's remand order "did not amount to a final determination on the merits," it did "indicate that we found [prior precedent] sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Id.* at 777. In short, a state court cannot pay lip service to the mandate, while evading its clear import.[10]

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[9] The state court acknowledged "the power and authority of the United States Supreme Court to reverse a State conviction for proper reasons or grounds based on the provisions of the Federal Constitution," *City of Rock Hill* v *Henry*, 135 S E 2d 718, 718 (S C 1963), and it claimed it was "endeavor[ing] to carry out the mandate of the United States Supreme Court," *id*; *see also id* at 719 Yet, the court found "that the light, if any, shed upon [the] instant case by the [Supreme Court's earlier] case is not readily or easily discernible," *id.* at 718 Just as the state court in *Smith* concluded that *Penry II* presented more egregious facts than the instant case, 185 S W 3d at 472, the *Henry* court explained· "We have reviewed the facts in this case, which we find more aggravated than those in the case [upon which remand was based], and conclude that there is nothing in th[at] case to require a reversal of [the] instant case," *Henry*, 135 S E 2d at 720.

[10] Two reversals were also necessary before the Florida Supreme Court complied with the mandate of the Supreme Court in *Chamberlin* v *Dade County Board of Public Instruction*, 374 U S 487 (1963) On the first grant of certiorari, the Court vacated the state court's decision, which had upheld various religious exercises in public schools, and remanded for reconsideration in light of two recent decisions *Id* at 487 On

Similarly, a state court's assertion that it has "acquiesc[ed]" in this Court's conclusion will be rejected when the state court applies the wrong harmless-error standard or misreads the record to which the standard is applied. *See Yates* v. *Aiken*, 500 U.S. 391, 399 (1991). Furthermore, an opinion that is only partially "responsive" to this Court's mandate will not stand. *See Yates* v. *Aiken*, 484 U.S. 211, 214 (1988) (granting certiorari because state court had not "fully complied" with the mandate). And, a state court cannot, as a means to evade this Court's mandate, use state law where the application of federal law is required: "The Supremacy Clause does not allow a federal retroactivity doctrine to be supplanted by invocation of a contrary approach to retroactivity under state law." *See Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993) (reversing where state court failed to apply federal retroactivity doctrine when applying the Court's decision regarding preferential tax benefits for state and local government employees).

The Court has applied the same principles when reviewing decisions by lower federal courts. Like state courts, lower federal courts may not fall short in their "attention to [this Court's] explanation of the governing legal standards." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999). Nor may they engage in "dismissive and strained interpretation" of evidence or case law to evade the clear guidance of this Court. *Miller-El*, 125 S. Ct. at 2339; *see also Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 847-849 (1986) (reversing Court of Appeals for second time where appellate court read precedent unduly narrowly). In short,

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remand, the Florida state court, like the Texas court in *Smith*, purported to "read with care" the Supreme Court decisions cited in the remand order 160 So 2d 97, 98 (Fla 1964) But it went on to critique the precedent as providing no "clear course for [the state courts] to follow," to distinguish its case from the Court's precedent, and to reach the same conclusion it had reached the first time it heard the case *Id* at 99 The Court again granted certiorari and reversed and remanded 377 U S 402, 402 (1964) (reversing in part and dismissing in part) Only when the Florida Supreme Court considered the case for the third time did it comply with the Supreme Court's mandate *See* 171 So 2d 535, 538 (Fla 1965)

this Court's cases over the last two hundred years have made clear that, whether state or federal, all lower courts must respect the integrity of this Court's mandates and the authority of this Court "to say what the law is." *Marbury*, 5 U.S. at 177.

Yet, that is precisely what the Texas Court of Criminal Appeals failed to do. Instead of following this Court's reasoned analysis, the Texas court concocted a new state-law procedural barrier it had previously declined to employ. It then ignored the specific findings of this Court and adopted an unduly narrow construction of the Court's holding, in order to reinstate the same result that this Court had previously rejected as inconsistent with the Eighth Amendment's dictates. The Texas court's decision thus undermines this Court's authority and contravenes its plain direction. This Court should reaffirm that it meant what it said in *Smith* and that state and lower courts must respect its decisions.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Texas Court of Criminal Appeals should be summarily reversed. In the alternative, the Court should grant plenary review and set this case for briefing and argument.

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(15)

No. 05-11304

IN THE

Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Where a defendant has failed to object to jury instructions at trial, does the State lose its right to a plain-error type of review on remand because the state appellate court initially but erroneously held there was no error?

2. Is a state procedural ground "adequate" when the state's procedural law provides both fair notice of the procedure to preserve claims and a reasonable opportunity to do so, but the rule and its exceptions continue to evolve through case law.

3. Is Texas's *Almanza* rule an adequate and independent state ground of decision in this case?

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Rompilla v. Beard, 545 U. S. 374, 125 S. Ct. 2456,
162 L. Ed. 2d 360 (2005) 15

Rose v. Lundy, 455 U. S. 509, 102 S. Ct. 1198,
71 L. Ed. 2d 379 (1982) 11

Selvage v. Collins, 975 F. 2d 131 (CA5 1992) 25

Shuttlesworth v. Birmingham, 376 U. S. 339,
84 S. Ct. 795, 11 L. Ed. 2d 766 (1964) 17

Simmons v. South Carolina, 512 U. S. 154,
114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994) 14

Smith v. Texas, 543 U. S. 37, 125 S. Ct. 400,
160 L. Ed. 2d 303 (2004) 3, 13

Sochor v. Florida, 504 U. S. 527, 112 S. Ct. 2114,
119 L. Ed. 2d 326 (1992) 22

Staub v. City of Baxley, 355 U. S. 313, 78 S. Ct. 277,
2 L. Ed. 2d 302 (1958) 16

Steel Co. v. Citizens for a Better Environment, 523 U. S. 83,
118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) 21

Stewart v. Smith, 536 U. S. 856, 122 S. Ct. 2578,
153 L. Ed. 2d 762 (2002) 11

Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984) 10, 21

Strickler v. Greene, 527 U. S. 263, 119 S. Ct. 1936,
144 L. Ed. 2d 286 (1999) 11

Sullivan v. Little Hunting Park, Inc., 396 U. S. 229,
90 S. Ct. 400, 24 L. Ed. 2d 386 (1969) 16, 19

Teague v. Lane, 489 U. S. 288, 109 S. Ct. 1060,
103 L. Ed. 2d 334 (1989) 22

Tennard v. Dretke, 542 U. S. 274, 124 S. Ct. 2562,
159 L. Ed. 2d 384 (2004) 13

Three Affiliated Tribes of Fort Berthold Reservation v. Wold
Engineering, P.C., 467 U. S. 138, 104 S. Ct. 2267,
81 L. Ed. 2d 113 (1984) 12, 15

United States v. Argento, 371 F. Supp. 2d 1167
(CD Cal. 2005) 6

United States v. Booker, 543 U. S. 220, 125 S. Ct. 738,
160 L. Ed. 2d 621 (2005) 4, 7

United States v. Dock, 426 F. 3d 269 (CA5 2005) 7

United States v. Edmonds, 2006 U. S. App. LEXIS 21419, No. 04-12971 (CA11, Aug. 22, 2006) 8

United States v. Fox, 393 F. 3d 52 (CA1 2004) 7

United States v. Fox, 429 F. 3d 316 (CA1 2005) 7

United States v. Gonzalez, 188 Fed. Appx. 547 (CA8 2006) 8

United States v. Lanier, 520 U. S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) 24

United States v. Lizarraga-Orduno, 150 Fed. Appx. 792 (CA10 2005) 8

United States v. Olano, 507 U. S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) 5, 10

United States v. Penaranda, 375 F. 3d 238 (CA2 2004) ... 6

Walker v. Birmingham, 388 U. S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210 (1967) 18

Walton v. Arizona, 497 U. S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990) 15

Ward v. Board of Commr's of Love Cty., 253 U. S. 17, 40 S. Ct. 419, 64 L. Ed. 751 (1920) 16

Williams v. Georgia, 349 U. S. 375, 75 S. Ct. 814, 99 L. Ed. 1161 (1955) 17, 18, 19, 21

Williams v. Taylor, 529 U. S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) 21

Williams v. Taylor, 529 U. S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) 9

Wright v. Georgia, 373 U. S. 284, 83 S. Ct. 1240, 10 L. Ed. 2d 349 (1963) 17

Rule of Court

Fed. Rule Crim. Proc. 52 ..... 4, 5

Tex. Rule App. Proc. 44.2(a) 5

United States Statute

28 U. S. C. § 2244(b) 26

Treatises

R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (5th ed. 2003) 16

5 W. LaFave, J. Israel, N. King, Criminal Procedure (2d ed. 1999) 6

16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure (2d ed. 1996) 18, 19, 20, 21, 24

Miscellaneous

V. Flango, Habeas Corpus in State and Federal Courts (National Center for State Courts 1994) 21

Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943 (1965) 16, 17

IN THE

Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the Texas Court of Criminal Appeals applied a heightened standard of review to a claim of error in a jury instruction to which defendant did not object at trial. This is standard practice in most jurisdictions. A claim that such

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

review is precluded merely because, in its initial consideration of the case, the appellate court erroneously concluded there was no error at all would create a loophole for defaulted claims, lead to needless reversals for minor errors on close questions, and reward sandbagging in the trial court. Such a rule is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Sixteen years ago, defendant LaRoyce Smith and his accomplices robbed a Taco Bell in Dallas, Texas where he had previously worked. The shift manager, Jennifer Soto, let him in after hours to use the telephone. Smith repaid her kindness by putting her in a headlock, pistol-whipping her, and then shooting her in the back. J. A. 135-136. He then threatened the other employee present, Travis Brown, with death if he called the police. Brown testified to these events at trial. J. A. 136.

The trial came after *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) (*Penry I*). Defendant moved to declare the Texas statute unconstitutional. J. A. 7-16. The trial court proposed an additional mitigation instruction to fix the *Penry* problem and expressly invited defense counsel to suggest any improvements. J. A. 21. Counsel did not. On direct appeal, the Texas Court of Criminal Appeals (CCA) found that the instruction given complied with *Penry I*. J. A. 145-147.

Smith's first state habeas application was dismissed as untimely, but, after the Legislature amended the governing statute, he filed a second petition. See *Ex parte Smith*, 132 S. W. 3d 407, 410 (Tex. Crim. App. 2004). The CCA found that the instruction was distinguishable from the one held insufficient in *Penry* v. *Johnson*, 532 U. S. 782 (2001) (*Penry II*), and denied the claim on the merits. See 132 S. W. 3d, at 410-411. This Court summarily reversed in a *per curiam* opinion, finding the instruction not distinguishable from *Penry*

II, and "remanded for further proceedings not inconsistent with this opinion." *Smith* v. *Texas*, 543 U. S. 37, 48-49 (2004).

On remand, the CCA applied the rule of *Almanza* v. *State*, 686 S. W. 2d 157 (1984) (op. on reh'g), the Texas standard of review for objections to jury instructions not raised at trial, and held that *Smith* had not carried his burden of showing "egregious harm," as *Almanza* requires for "unobjected-to-jury-charge error." *Ex parte Smith*, 185 S. W. 3d 455, 457 (Tex. Crim. App. 2006). This Court granted certiorari on Nov. 13, 2006.

SUMMARY OF ARGUMENT

Texas's *Almanza* rule is similar in purpose and operation to Federal Rule of Criminal Procedure 52. It does not prevent all review of unobjected-to errors but instead requires a greater showing of harm by the defendant. The Texas court's invocation of this standard after reversal of its initial decision that there was no error was proper and is the same as the course of action this Court directed in the wake of *United States* v. *Booker*.

The *Almanza* rule is independent of federal law to the extent it assesses degree of harm after the federal question has been decided or assumed in the defendant's favor. However, if this Court should decide that the CCA erred against defendant regarding which items of mitigation were outside the scope of the special issues, the correct course under *Three Affiliated Tribes* is to clarify the federal predicate and remand for redetermination of the state question.

The law regarding "adequate" state grounds is a tangle of confusion. *Amicus* submits that the Court should adopt a rule along the lines suggested by Professor Wright that fair warning of the requirement and a reasonable opportunity to comply are all that is required.

The Texas court's application of a long-established rule to the circumstances of this case was not an unjustified or unpredictable break with prior law, and defendant had ample opportunity to voice any objection to the instruction before it was given.

ARGUMENT

I. Where a defendant has failed to object at trial, the state does not lose its right to review under a "plain error" type of standard merely because the state court initially held there was no error.

Much of the dispute in this case involves how to characterize the Texas rule of *Almanza* v. *State*, 686 S. W. 2d 157 (Tex. Crim. App. 1984) (op. on reh'g). Is it a harmless error rule or a procedural default rule? See, *e.g.*, Brief for Petitioner 44-45. Supplemental Brief in Opposition 2, 7. *Amicus* CJLF submits that the two parts of the *Almanza* rule are closely analogous to the two subdivisions of Federal Rule of Criminal Procedure 52, "Harmless and Plain Error." Far from being an evasion of this Court's mandate reminiscent of the darkest days of the civil rights struggle, see Brief for John J. Gibbons, et al., as *Amici Curiae* 12-13, and n. 6, the Texas court's application of the second part of *Almanza* on remand is substantially the same as the course of action this Court indicated was proper in *United States* v. *Booker*, 543 U. S. 220, 268 (2005).

A. Plain Error.

When a criminal defendant timely objects to a federal constitutional violation, the standards for harmless error are set by this Court's precedents in state and federal courts alike. If the error is "structural" there is no harmless error analysis, see *Arizona* v. *Fulminante*, 499 U. S. 279, 309 (1991), but very few errors are. See *Johnson* v. *United States*, 520 U. S. 461, 468-469 (1997). For all others, the error requires reversal unless the prosecution shows it was harmless beyond a reasonable doubt.

See *Chapman* v. *California*, 386 U. S. 18, 24 (1967). Not only does Texas not dispute this, it has gone so far as to codify the *Chapman* standard. See Tex. Rule App. Proc. 44.2(a).

In federal courts, nonconstitutional errors to which the defendant did object at trial are reviewed for harmlessness under a more lenient standard. See *United States* v. *Olano*, 507 U. S. 725, 734-735 (1993) (discussing Rule 52(a)). The same is true in Texas courts. See *Almanza*, 686 S. W. 2d, at 171. This is the "some harm" standard.

For constitutional errors not objected to, the federal courts do not and the state courts need not apply the *Chapman* standard. The federal standard under Rule 52(b) and *Olano* is quite difficult for the defendant.

> "Under that test, before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' 507 U. S., at 732. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *Johnson* v. *United States*, 520 U. S. 461, 466-467 (1997) (internal quotation marks omitted in part).

Applying the *Olano* rule, the very first question is whether there was error at all. See *id.*, at 467. Unlike the situation on federal habeas corpus, where procedural default is normally addressed before the merits, see *Lambrix* v. *Singletary*, 520 U. S. 518, 525 (1997), the *Olano* structure calls for the merits to be addressed first. If a court were to decide there was no error, there would be no point in discussing the remaining criteria for relief. See, *infra*, at 7.

B. The Booker Remands.

Unlike *Chapman*, which is a constitutional rule, this Court views the plain error rule as being within legislative control. Rule 52(b) is binding, and courts have no authority to make

exceptions. See *Johnson*, 520 U. S., at 466. If there is no *Chapman*-like constitutional mandate that overrides federal rules, then there is no constitutional mandate that overrides state rules and statutes, as construed by the state courts. A state could refuse to consider unpreserved claims of error under any standard, and a few do. See 5 W. LaFave, J. Israel, N. King, Criminal Procedure § 27.5(d), p. 926, n. 98 (2d ed. 1999). With no review at all constitutionally required, the standard chosen by states for making an exception is a matter of state law.

Petitioner contends that the CCA's initial decision that there was no error precludes its use of the "egregious harm" standard on remand. See Brief for Petitioner 41-44. *Amicus* Constitution Project contends that the CCA "sidestep[ped] this Court's ruling by imposing [a] new state-law procedural barrier[] on remand . . . ." Brief for the Constitution Project as *Amicus Curiae* 21 ("CP Brief"). At the petition stage, a group of former federal judges similarly accused the CCA of "thwart-[ing] compliance with this Court's decision." Brief for John J. Gibbons, et al., as *Amici Curiae* 8.

For perspective, it is useful to examine what this Court said the federal courts of appeals should do and what they actually did in the wake of *Booker*, *supra*. For two decades after the enactment of the Sentencing Reform Act of 1984, the Federal Sentencing Guidelines were mandatory. Attacks on them based on *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), were routinely rejected until *Blakely* v. *Washington*, 542 U. S. 296 (2004). See *United States* v. *Penaranda*, 375 F. 3d 238, 243, n. 5 (CA2 2004) (collecting cases). Between the *Blakely* earthquake and the *Booker* aftershock, the circuits were divided, and some continued to uphold the Guidelines as mandatory. See *United States* v. *Argento*, 371 F. Supp. 2d 1167, 1169 (CD Cal. 2005) (collecting cases). This created a situation where many defendants who were tried before *Blakely* did not make a Sixth Amendment objection at trial and where

many courts of appeals in the interim period did not believe there was any error.

The *Booker* opinion itself indicates what should happen in these cases. "Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain error' test." 543 U. S., at 268. This is dictum, but the courts of appeals have followed it.

United States v. *Dock*, 426 F. 3d 269 (CA5 2005), followed an appellate trajectory nearly identical to the present case. On his initial appeal, Dock raised a *Blakely* objection to the Sentencing Guidelines, which the Court of Appeals summarily rejected on the merits based on circuit precedent. See *id.*, at 271. This Court granted, vacated, and "remanded for further consideration in light of . . . *Booker* . . . ." *Dock* v. *United States*, 545 U. S. 1112 (2005). On remand, the Court of Appeals applied the plain error standard due to the lack of an objection at sentencing. See 426 F. 3d, at 272. The court denied relief because Dock could not carry his burden under that standard. See *ibid.*

United States v. *Fox*, 429 F. 3d 316 (CA1 2005), presents a variation on the theme. In the initial appeal, the First Circuit stated the *Olano* test but did not go past the first prong—there was no error. *United States* v. *Fox*, 393 F. 3d 52, 62-63 (CA1 2004). After this Court's "GVR," see *Fox* v. *United States*, 545 U. S. 1125 (2005), the Court of Appeals found that Fox could not clear the third hurdle of *Olano*, a reasonable probability of a lesser sentence. See 429 F. 3d, at 318.

These two cases differ only in form, not in substance. Should Dock have received a new sentencing hearing and Fox not received one because one court found no *Blakely* error as a ruling on the merits and the other court found no *Blakely* error as the first prong of *Olano*? That would elevate form over substance and result in arbitrary dispensation of relief.

Yet that is the implication of petitioner's argument that once a court rejects a claim on the merits it cannot apply the plain-error rule after a vacate-and-remand. There are many other examples of federal courts of appeals in multiple circuits applying the plain-error rule after a *Booker* remand, although they are unpublished. See, *e.g.*, *United States* v. *Gonzalez*, 188 Fed. Appx. 547 (CA8 2006); *United States* v. *Lizarraga-Orduno*, 150 Fed. Appx. 792, 798-800 (CA10 2005); *United States* v. *Edmonds*, 2006 U. S. App. LEXIS 21419, No. 04-12971 (CA11, Aug. 22, 2006). In searching through the *Booker* remand cases, *amicus* has not found a single one where the applicability of plain-error review depended on whether the Court of Appeals had invoked that rule on the first appeal.[2]

C. The Almanza Rule.

Given that the federal *Olano* rule is not precluded by an initial but vacated affirmance on the merits, we turn to the question of whether the Texas *Almanza* rule should be any different. In 1985, the Texas Court of Criminal Appeals en banc[3] undertook to clear up a confused area of the law. The standard of review for errors in the jury charge was governed by an opaque statute and irreconcilable case law. See 686 S. W. 2d, at 161. The court extracted the correct meaning of the statute via a thorough historical review of statutes and precedents. See *id.*, at 161-171.

Six years before Smith's trial, the state court gave this definitive construction of the Texas statute.

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2. We estimate that there are approximately 800 *Booker* GVR cases and do not claim to have read all of the opinions on remand, but we have searched for a case drawing this distinction and not found one.

3. In the South Western Reporter, the 1984 panel opinion and the 1985 opinion on rehearing en banc are published together. The en banc opinion, authored by the panel dissenter, begins on page 160.

"Article 36.19 actually separately contains the standards for *both* fundamental error and ordinary reversible error. If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is 'calculated to injure the rights of defendant,' which means no more than that there must be *some* harm to the accused from the error. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless.

"On the other hand, if no proper objection was made at trial and the accused must claim that the error was 'fundamental,' he will obtain a reversal only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.' " *Id.*, at 171.

As so construed, the Texas law parallels Rule 52. The first part is the harmless error rule for preserved, nonconstitutional errors. The second part sets the bar considerably higher for defendants who fail to object in the trial court, and it applies to constitutional as well as nonconstitutional claims. See *Jimenez* v. *State*, 32 S. W. 3d 233, 235-239 (Tex. Crim. App. 2000).

Returning to our original question, is this second part a harmless error rule or a procedural default rule? See *supra*, at 4. Like Rule 52(b) as construed in *Olano*, it is both. Like the third and fourth prongs of *Olano*, it is based on an assessment of the actual harm to the defendant, which makes it a kind of harmless error analysis. Yet, like Rule 52(b), this higher burden is only imposed as a result of the defendant's default, *i.e.*, his failure to object to the charge in time to prevent the error. Cf. *Williams* v. *Taylor*, 529 U. S. 420, 432 (2000) (additional burdens of 28 U. S. C. § 2254(e)(2) triggered only by fault of defendant).

The State notes that "the lack of an objection to jury charge error, generally speaking, does not forfeit the error on appeal in Texas; it merely requires a more onerous showing of harm for

reversal." Supp. Brief in Opp. 7. True, but the fact that the claim is not completely barred by the *Almanza* rule does not mean that *Almanza* is not a default rule as that term is used in the jurisprudence of this Court's jurisdiction and of federal habeas corpus. *Almanza* holds that failure to object when required forfeits the relatively lenient harmless-error review that would otherwise apply (either *Chapman* or "some harm") and substitutes the more stringent standard of "fundamental" or "egregious harm."[4] In the federal system, "Rule 52(b) defines a single category of forfeited-but-reversible errors," *Olano*, 507 U. S., at 732, and *Almanza* operates in the same way. See *Jimenez*, 32 S. W. 3d, at 238 (referring to rights being "forfeitable" in applying *Almanza*).

The CCA's application of the *Almanza* rule on remand in this case was neither an act of defiance nor an evasion of this Court's mandate. Both the rule itself and its application to this case are well within the mainstream of American jurisprudence. The threshold question for this case, then, is whether and to what extent the state court's decision stands on an independent and adequate state ground.

II. A heightened standard of review for claims not made at trial is an independent state ground when it operates to deny relief based on an assessment of the degree of harm to the defendant.

On direct review of state court decisions, this Court's jurisdiction is not precluded by a state ground of decision unless that ground is "independent of federal law." *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985). In *Ake*, the state's exception to its waiver rule for fundamental errors included all

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4. The Texas court has noted that verbal formulations in this area are necessarily imprecise, and that variations in wording often matter little. *Almanza*, 686 S. W. 2d, at 172; cf. *Strickland* v. *Washington*, 466 U. S. 668, 696-697 (1984); *Chapman*, 386 U. S., at 24.

federal constitutional errors as "fundamental." See *id.*, at 74-75. "Thus, the State has made application of the procedural bar depend on an antecedent ruling of federal law, that is, on the determination of whether federal constitutional error has been committed." *Id.*, at 75.

State rules such as the one in *Ake* are a vanishing breed because federal constitutional restrictions on state criminal procedure long ago expanded beyond the fundamental. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting). In *Stewart* v. *Smith*, 536 U. S. 856, 858 (2002) (*per curiam*), the Court considered an Arizona successive petition rule with differing standards for claims of "sufficient constitutional magnitude." On a certified question, the Arizona Supreme Court clarified that this referred only to the category of claim, not an evaluation of the merits. See *id.*, at 859. Under this rule, "[c]ourts need not decide the merits of the claim, *i.e.*, whether the right was actually violated." *Id.*, at 859-860. If a determination that a defaulted claim does not meet the state's criteria for an exception to the default rule can be made independently of deciding whether there was federal constitutional error at all, the rule is independent.[5]

For a few claims, the harmfulness of what happened is an element of the constitutional claim. For example, if exculpatory evidence is not material, there is no constitutional obligation to disclose it, and therefore there is no such thing as a nonprejudicial *Brady*[6] error. See *Strickler* v. *Greene*, 527 U. S. 263, 281-282 (1999). Putting these claims to one side, the assessment of the harm caused by the procedure that the defendant objects to is generally a separate question from whether the procedure was correct. Jury instructions generally

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5. *Stewart* noted, but did not decide, the still-unresolved question of whether the independence requirement applies to federal habeas at all. See *id.*, at 860.

6. *Brady* v. *Maryland*, 373 U. S. 83 (1963).

do not depend for their correctness on any assessment of the harm they cause the defendant.

A harmless-error analysis is usually preceded by a determination that there was an error. See *Lockhart* v. *Fretwell*, 506 U. S. 364, 369, n. 2 (1993). In most criminal appeals, this would be a determination in the defendant's favor. However, the state court's harmless error analysis could have a federal predicate unfavorable to the defendant in determining the scope of the error that needs to be assessed for harm. In the case of a *Penry* claim, some evidence may be within the scope of the special issues and some may not. Drawing that line is a federal question, and a difficult one. In the "fog of confusion that is [this Court's] annually improvised Eighth Amendment 'death is different' jurisprudence," *Morgan* v. *Illinois*, 504 U. S. 719, 751(1992) (Scalia, J., dissenting), the Texas special issue system is an exceptionally dense patch. For example, *Penry* v. *Johnson*, 532 U. S. 782, 797 (2001) (*Penry II*) curiously quotes the *dissent* in an earlier case for a proposition *rejected* by the opinion of the Court in that case. Cf. *Johnson* v. *Texas*, 509 U. S. 350, 373 (1993). Such language leaves judges in both state and federal courts in Texas scratching their heads.

If a state court were to find that some items are within the scope of the special issues and the *remaining* items were insufficiently mitigating to be harmful under an independent state rule, the latter determination would nonetheless depend on the former. This Court has jurisdiction to review the federal predicate to the state question, and, if error is found, to vacate and "remand the case so that the [state] court may reconsider the state-law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U. S. 138, 152 (1984).

The CCA's opinion in the present case is less than clear regarding which items of mitigating evidence it thought were within the reach of the sentencer through the special issues and which were outside the scope but not sufficiently substantial

that their exclusion fell short of the "egregious harm" threshold. The CCA declared itself uncertain on this point, an uncertainty that is entirely understandable given both the inconsistency of this Court's Texas special issues cases generally and its puzzling summary *per curiam* opinion in the present case.

This Court's summary disposition makes this reference to the cognizability of the mitigating evidence under the special issues: "And just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Smith* v. *Texas*, 543 U. S. 37, 48 (2004) (*Smith I*). On its face, this statement could be read to imply that *none* of the mitigation evidence was within the special issues, but it could not possibly mean that without a serious disregard for precedent.

In the present case, the defendant's primary mitigating circumstance was his youth at the time of the crime. That is the only circumstance mentioned in his pretrial attack on the special issues. See J. A. 8-9. As to this circumstance, there unquestionably was no *Penry* error. *Johnson*, 509 U. S., at 368, is binding precedent squarely on point. "We believe there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination." This holding cannot be overruled without making a "new rule." See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Whorton* v. *Bockting*, No. 05-595, pp. 5-7. *Tennard* v. *Dretke*, 542 U. S. 274 (2004), and *Penry II*, 532 U. S., at 782, are both habeas cases, where new rules cannot be made absent exceptions not applicable here. *Smith I* is a summary disposition, something normally done only on established law, again with exceptions not applicable here. See *Lambrix* v. *Singletary*, 520 U. S. 518, 538-539 (1997). None of these cases purports to overrule *Johnson*, and none was decided in a posture where reconsidering a precedent was in order. *Johnson*, therefore, is

still good law. See also *Ayers* v. *Belmontes*, 549 U. S. __ (No. 05-493, Nov. 13, 2006) (slip op., at 8) (citing *Johnson*).

Smith I lists four items of mitigating evidence in addition to age: (1) diagnosis with a learning disability; (2) low score on an IQ test and placement in special education; (3) good behavior in school; and (4) having a father who was a drug addict and stole from the family. Evidence of good behavior is certainly important, but it is just as certainly within the scope of future dangerousness or lack of it. Indeed, *Kelly* v. *South Carolina*, 534 U. S. 246, 254 (2002) held that, realistically, evidence of past violent behavior is so clearly related to future violence as to trigger the parole eligibility disclosure requirement of *Simmons* v. *South Carolina*, 512 U. S. 154 (1994). It follows logically that evidence of good behavior is relevant and accessible to the sentencer under the dangerousness special issue.

The CCA "assume[d], for the sake of argument, that at least some of applicant's evidence was not fully encompassed by the two special issues." 185 S. W. 3d, at 467. With this Court's precedents squarely on point for age and logically controlling for good behavior, the worst case scenario is that the early diagnosis, the IQ test and special education, and the addicted, thieving father were possibly outside the jury's reach. These items fall far short of the compelling mitigation needed to reach a threshold of "egregious harm" or "fundamental error" under the "entire record" of this case. See *id.*, at 468. The defendant himself factually disproved the low IQ factor by taking the stand and demonstrating his mental capacity directly to the jury, holding his own against a professional prosecutor on cross-examination. See *id.*, at 469. The placement in special education was apparently not the consequence of permanent or organic disability, as defendant caught up to his grade level and was returned to regular classes. See *id.*, at 460. Defendant's father will not win any awards for Father of the Year, but this evidence is a far cry from the kind of abuse that has been

presented in other cases. See *e.g.*, *Rompilla* v. *Beard*, 545 U. S. 374, 391-392 (2005).

In summary, the items of mitigation that are even arguably outside the scope of the special issues are factually weak, only mildly mitigating, or both. A court could find them to be harmless error even under the *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993) standard.[7] Whether they fall beneath the Texas threshold of "egregious harm" is an independent question of state law for the state court to decide. If the uncertainty of the state court opinion is deemed to bring the question within this Court's jurisdiction, and if this Court believes the CCA has erred on the federal question, the proper course is to decide which items of mitigating evidence were outside the effective reach of the sentencer and remand for redetermination of the state question with that federal predicate clarified. See *Three Affiliated Tribes*, 467 U. S., at 152.

III. "Reasonable opportunity" should be adopted as the test of adequate state procedural grounds and the prior patchwork of confusing phrases discarded.

Amicus Constitution Project contends that the *Almanza* rule is not an "adequate" state ground. CP Brief 16-18. This contention provides the Court with an opportunity to clear up some long-standing confusion. This Court's precedents on adequate state grounds span the entire twentieth century, and they form a haphazard patchwork, offering "[v]arying [r]ub-

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7. The fact that consideration of such evidence is considered a federal constitutional question illustrates once again the weakness of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and its progeny. See *id.*, at 622-624 (White, J., concurring in the judgment); *Walton* v. *Arizona*, 497 U. S. 639, 661-673 (1990) (Scalia, J., concurring in part and in the judgment), overruled on other grounds in *Ring* v. *Arizona*, 536 U. S. 584, 589 (2002); *Graham* v. *Collins*, 506 U. S. 461, 478-500 (1993) (Thomas, J., concurring). Reconsidering *Lockett* is not the question presented in this case, but it should be reconsidered in the near future.

rics" for defining inadequacy. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 557 (5th ed. 2003) (cited below as "Hart & Wechsler"). The phrases offered up include "without any fair or substantial support," *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 22 (1920), "arid ritual of meaningless form," *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the defendant "could not fairly be deemed to have been apprised of [the rule's] existence," *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958), a rule not previously applied "with the pointless severity" of the present case, *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), "impos[ing] unnecessary burdens upon [federal] rights," *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294, 298 (1949), "more properly deemed discretionary than jurisdictional," *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 234 (1969), "not strictly or regularly followed," *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964), and finally, whether "the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by [the state] court." *Central Union Telephone Co.* v. *Edwardsville*, 269 U. S. 190, 194-195 (1925); *Parker* v. *Illinois*, 333 U. S. 571, 574 (1948) (quoting and following *Central Union*).

One scholar surveying the varying formulations declared that "the governing rules may be discerned less in what the Court has been saying than in what it has been doing." Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 944 (1965). More than once, the Court has used broad language to declare a state ground inadequate and then refused to review a claim in a later case that would seem to come within that language, never explaining the apparent inconsistency.

Davis v. *Wechsler*, 263 U. S. 22, 23 (1923), involved a jurisdictional objection based on an executive order implementing a federal statute. The objection was rejected by the state court on the ground that the objecting party had waived it by entering a general appearance, even though the pleading

making the appearance clearly stated the objection. Justice Holmes, in often-quoted language, rejected the contention that this ground blocked Supreme Court review. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Id.*, at 24.

This statement seems to imply a sweeping authority to disregard state procedural defaults, so long as the objection is "plainly and reasonably made." The appellant in *Central Union*, *supra*, thought so. It had forfeited its constitutional claims, under well-established Illinois rules, by taking its appeal to the intermediate appellate court rather than the Illinois Supreme Court. 269 U. S., at 193-194. There was nothing unplain or unreasonable about its statement of its claims. Yet the Court held that the state procedural default ground was adequate, stating the "reasonable opportunity" standard quoted *supra*, at 16. The two cases were decided only two years apart. Both were unanimous. Eight Justices participated in both cases, including the authors of both opinions. Yet there is no explanation of why a claim that seems to come within the language of *Davis* was rejected in *Central Union*. *Barr* v. *City of Columbia*, 378 U. S., at 149-150, claimed that its "strictly or regularly followed" standard reflected established precedent. This is an overstatement, to put it mildly, see Hill, *supra*, at 962, n. 71, unsupported by the earlier cases. *Barr* cites four cases for this proposition, yet the word "strictly," which has been the source of much mischief since *Barr*, does not appear in the statement of the rule in any of the four. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S., at 457, sets forth the novelty/fair notice standard. *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963), and *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S., at 301, quote *Patterson*. *Shuttlesworth* v. *Birmingham*, 376 U. S. 339 (1964), is a summary reversal citing *Williams* v. *Georgia*, 349 U. S. 375 (1955) but not otherwise stating a test. *Williams* was a case of discriminatory use of a discretionary power, such that "the state court action in the

particular circumstances is, in effect, an avoidance of the federal right." *Id.*, at 383. The "strictly" requirement in *Barr* was a bolt from the blue, and one that can cause perverse results if taken literally, creating a disincentive for states to vest their courts with needed discretion. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4026, pp. 385-386 (2d ed. 1996).

Bennett v. *Mueller*, 322 F. 3d 573 (CA9 2003), illustrates how the *Barr* rule spawns pointless litigation and punishes flexible state relief limits. California, like most jurisdictions, has a requirement that state habeas petitions be timely filed, a rule well established before Bennett's 1986 guilty plea. See *In re Stankewitz*, 40 Cal. 3d 391, 396, n. 1, 708 P. 2d 1260 (1985). Yet Bennett filed his state habeas petition almost thirteen years after the judgment and six years after the state supreme court had further clarified the timeliness rule. See 322 F. 3d, at 579. A clearly established rule, ample opportunity to comply, and a clear violation of the rule were not enough to make the state rule "adequate" in the Ninth Circuit. The case had to be remanded to the District Court to launch an investigation of the state courts to determine if they had been sufficiently strict in applying the rule. See *id.*, at 583. California could avoid this kind of inquisition by replacing its relatively flexible timeliness rule with a rigid statute of limitations, as Congress did in enacting 28 U. S. C. § 2244(d). It is difficult to see what federal interest is served by encouraging such a change or by squandering scarce judicial resources in these kinds of investigations.

In *Walker* v. *Birmingham*, 388 U. S. 307, 319 (1967), the Court described *Barr* as a case "where a state court has followed a regular past practice of entertaining claims in a given procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar." If *Barr* itself had used these words, instead of its unprecedented and unnecessary "strictly" language, much confusion could have been avoided.

Some cases in the series reach eminently sensible results on their facts, entirely consistent with precedent, yet inexplicably assert indefensible and unprecedented rationales for them. *Sullivan*, *supra*, is the worst of this lot. The state ground was indeed inadequate because, as Justice Harlan explained in dissent, the appellant had no reason to believe that the procedure he followed was not in compliance. See 396 U. S., at 245-247 (applying the *Patterson* novelty standard). Instead of applying this well-established standard, the *Sullivan* majority made the breathtaking assertion that all rules involving the exercise of discretion are inadequate. See *id.*, at 234; Wright, Miller, & Cooper, *supra*, at 385-386. Although *Williams* v. *Georgia*, 349 U. S., at 389, also was based on the discretionary nature of the rule, the opinion implies that it was the discriminatory use of that discretion, rather than the mere existence of discretion, that enabled federal review. See *id.*, at 383.

A single, coherent standard is long overdue. The standard should accommodate the need to respect state procedures while recognizing the responsibility of the states to provide meaningful remedies for federal claims and opening the door to federal relief when they do not. Respect for *stare decisis* also requires a standard consistent with the results in most of the precedents. That standard, *amicus* submits, can be formed by combining *Patterson*'s "fairly . . . apprised" with *Central Union*'s "reasonable opportunity." That is, the claimant should have fair notice that the rule exists and applies to the circumstances, and he should have a reasonable opportunity to present his federal claim. The leading commentator on federal procedure has proposed a similar test. See Wright, Miller, & Cooper, *supra*, § 4027, at 386-387, 392. Nothing more is required.[8]

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8. If trial counsel fails to use the reasonable opportunity, that may form the basis of an ineffective assistance claim, either as an independent claim or as "cause" for the default. That claim, in turn, must be presented to the state courts at the proper time, if one is provided. See *Edwards* v. *Carpenter*, 529 U. S. 446, 452 (2000).

The test *amicus* proposes is consistent with the policy of respecting the right of the states to regulate procedure in their own courts, see *Coleman* v. *Thompson*, 501 U. S. 722, 745-747 (1991), while also protecting "the federal interests in protecting federal rights against bad procedure." See Wright, Miller, & Cooper, *supra*, § 4021, at 302. The proposed test is also consistent with the results, if not the language, of all this Court's "adequate state ground" cases except the notorious *Henry* v. *Mississippi*, 379 U. S. 443 (1965). As Justice Kennedy has explained, that case was simply wrongly decided and should be overruled. See *Lee* v. *Kemna*, 534 U. S. 362, 393-395 (2002) (dissenting opinion). Space does not permit a thorough discussion of these points, but they are discussed in our brief in *Lee*. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lee* v. *Kemna*, No. 00-6933, pp. 10-19, http://www.cjlf.org/pdf/Lee.pdf.

IV. State cases which deny defaulted claims on the merits should not be deemed failures to enforce the rule.

The federal judge *amici* cite a number of cases *denying Penry* claims without discussion of the *Almanza* rule as evidence that its invocation in this case "is novel and aberrational." Brief for John J. Gibbon, et al., as *Amici Curiae* 10. Under the test proposed by Professor Wright and colleagues and urged in Part III of this brief, these cases would be irrelevant. A rule clearly stated in a statute or the rules of court and frequently enforced provides fair notice of its existence, even if it is not "strictly" enforced.

Even if the "strictly or regularly followed" test survives, however, there is an important distinction which has so far been overlooked. There is a major difference between skipping past a defaulted issue to *deny* a claim on the merits and excusing a default to *grant* a claim on the merits.

Much of the "inadequate state ground" jurisprudence has its roots in the suspicion of discrimination against disfavored

claims or parties. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4026, p. 384 (2d ed. 1996). In order to have a disfavored group, there must be a favored group. A court which skips past a default issue to deny the claim on the merits has not done the party much of a favor. Such a decision does open the door to federal review on the merits, but relief was a remote possibility even before enactment of the present subdivision (d) of 28 U. S. C. § 2254 in 1996. See V. Flango, Habeas Corpus in State and Federal Courts 61 (National Center for State Courts 1994) (1609 denied in sample of 1626). It is even more remote since. See *Williams* v. *Taylor*, 529 U. S. 362, 410-411 (2000). Most claimants who are denied relief by state courts will not obtain it from federal courts either, regardless of whether the denial is on procedural grounds or on the merits. Therefore, denying a claimant relief on one ground rather than another is not the kind of discrimination that implicates the federal interests involved here. Cf. *Williams* v. *Georgia*, 349 U. S. 375, 384-387 (1955) (noting similar cases in which relief was granted).

When the responding party contends that a claim is both meritless and defaulted, a court may have sound reasons for denying it on the merits rather than deciding the default issue. When the moving party must clear multiple hurdles to obtain relief, there is generally no requirement to decide the issues in any particular order. Once it is clear that the moving party cannot clear one hurdle, there is usually no hard-and-fast requirement to decide any of the others. For example, *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984) expressly endorsed the practice of denying ineffective assistance claims for lack of prejudice without deciding whether counsel's performance was deficient, whenever that is the easier route to decision.

Federal courts recognize an exception to the rule stated above for jurisdiction. Because the legitimacy of the decision of other issues depends on it, jurisdiction must be decided first. *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83,

94-95 (1998). Procedural default issues can claim this priority when they are jurisdictional, such as direct review in this Court of state-court decisions. See *Sochor* v. *Florida*, 504 U. S. 527, 535, n. * (1992). When the default is not jurisdictional, the order of decision becomes discretionary.

Lambrix v. *Singletary*, 520 U. S. 518 (1997), addressed the order of consideration of procedural default issues. In federal habeas cases, these issues should ordinarily be decided before retroactivity and the merits, but not invariably. *Id.*, at 525. "Judicial economy might counsel giving the *Teague*[9] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." *Ibid.* The *Lambrix* Court then proceeded to resolve the case on the basis of *Teague*, without answering the default question. *Ibid.*

There is no basis in reason or policy why a state rule should be branded as "inadequate" merely because the state courts occasionally take the same path that this Court took in *Lambrix* and that Congress authorized for unexhausted claims in 28 U. S. C. § 2254(b)(2). Judicial economy in the state appellate courts is no small concern. Once it becomes obvious that an appellant cannot clear one of several hurdles in the path to relief, it would be a pointless waste of a scarce resource to decide whether he can clear the others.

Jimmy Swaggart Ministries v. *Board of Equalization of Cal.*, 493 U. S. 378 (1990), illustrates that dismissal of a meritless, defaulted claim on the merits does not render a state rule "inadequate." Swaggart challenged the taxation of religious materials before the Board of Equalization on First Amendment grounds. *Id.*, at 382-384. The Board's rejection of the First Amendment claim was affirmed on the merits by the state court and this Court. *Id.*, at 384, 397. In the state court, Swaggart also raised a claim under the Commerce

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9. *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion).

Clause and a claim under the Ninth and Tenth Amendments, even though neither had been raised before the Board. See *Jimmy Swaggart Ministries* v. *State Bd. of Equalization*, 204 Cal. App. 3d 1269, 1290, 1292, n. 19, 250 Cal. Rptr. 891, 905, 907, n. 19 (1988). The state court denied the Commerce Clause claim as procedurally defaulted, *id.*, at 1292, 250 Cal. Rptr., at 906-907, and the Ninth/Tenth Amendment claim on the merits. *Id.*, at 1293, 250 Cal. Rptr., at 907-908.

On appeal, this Court rejected Swaggart's contention that California's procedural rule was "not 'strictly or regularly followed.' " 493 U. S., at 398-399. The rule was "adequate" even though "the Court of Appeal in this case . . . ignored the procedural bar and ruled on the merits of appellant's Ninth and Tenth Amendment arguments [citation] even though those arguments were likewise not raised" in the administrative proceedings. *Ibid.* The apparent reason the state court went to the merits of the latter arguments is that they were "singularly unpersuasive," 204 Cal. App. 3d, at 1293, 250 Cal. Rptr., at 907, and thus decision on the merits was more efficient than pondering the exceptions to California's administrative exhaustion rule. This Court in *Swaggart* brushed off the argument that the state court's choice had somehow rendered the rule inadequate, stating only that "appellant has failed to substantiate any claim that the California courts apply this exception in *an irregular, arbitrary, or inconsistent manner*." 493 U. S., at 399 (emphasis added).

Swaggart thus tells us that "strictly or regularly followed" means not "irregular, arbitrary, or inconsistent." It further tells us that dismissing a meritless defaulted claim on the merits rather than on the default is not irregular, arbitrary, or inconsistent. A party claiming that a state rule is "inadequate" due to less-than-strict enforcement should have to show, at a minimum, that substantial numbers of other litigants are unfairly favored by having their claims reviewed *and granted* despite an indistinguishable procedural default.

V. Defendant had fair notice of the rule and an opportunity to comply, and the rule was fairly applied to his case.

Petitioner complains that his is the first case in which the rule of *Almanza* v. *State*, 686 S. W. 2d 157 (1984) (op. on reh'g) "has ever been applied to a *Penry* claim on state habeas." Brief for Petitioner 47, n. 16. In the common law method of rulemaking, someone's case has to be the first. Whether a case is the first in some narrowly, and arguably artificially, defined category is not the test. The test should be "that in attempting to assert a federal right litigants are neither surprised by the creation of novel procedural doctrines, nor confounded by procedures so complex that ordinarily competent attorneys cannot secure determination of that right." 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4027, pp. 386-387 (2d ed. 1996).

The due process cases are instructive here. Fair warning does not require a case squarely on point. See *United States* v. *Lanier*, 520 U. S. 259, 271 (1997). Even for the substantive definition of crimes, it is only "unjustified and unpredictable breaks with prior law" that "violate[] the principle of fair warning." See *Rogers* v. *Tennessee*, 532 U. S. 451, 462 (2001). The present case does not involve a change in substantive criminal law or even a change to the law of trial procedure. Every competent lawyer knows you must object to the jury charge before it is given or risk losing the claim. The only change here is the circumstances under which an objection will be considered despite the default.

On its face, the *Almanza* standard applies to defaulted objections to the jury charge. See 686 S. W. 2d, at 171. Application of the standard to *Penry* claims was an entirely foreseeable development. Nor should any defendant expect a *more* favorable standard on habeas corpus than he receives on direct appeal. That would be backwards, for reasons recognized long before Smith's trial. See *Davis* v. *United States*, 411 U. S. 233, 240-241 (1973).

Petitioner objects to the application of *Almanza* to his constitutional claim, citing *Ladd* v. *State*, 3 S. W. 3d 547, 564 (Tex. Crim. App. 1999), for the proposition *Almanza* does not apply. Brief for Petitioner 47, n. 16. This is an odd objection. In *Ladd*, the appellant *requested* review of his defaulted claims under *Almanza*, and the CCA refused to give him any review *at all*. By reviewing under *Almanza* instead of declaring a complete forfeiture of the claim, the CCA has made a change in petitioner's favor. Instead of applying a rule with greater severity than before, cf. *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), the CCA has mitigated the severity. Reviewing for "egregious harm" in lieu of no review at all hardly constitutes setting "springes." Cf. *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923) (Holmes, J.).

Amicus Constitution Project indicts the CCA for the crime of granting relief in several cases, despite lack of an objection at trial, in the wake of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) (*Penry I*). CP Brief 18-19. All of these cases were tried before *Penry I* and are therefore distinguishable. Federal habeas law recognizes an exception for novel claims, *Reed* v. *Ross*, 468 U. S. 1, 14-15 (1984), and so does Texas. See *Black* v. *State*, 816 S. W. 2d 350, 368-370 (Tex. Crim. App. 1991) (Campbell, J., concurring) (citing *Reed*); *Ramirez* v. *State*, 815 S. W. 2d 636, 655 (Tex. Crim. App. 1991) (following *Black* concurrence). On federal habeas, a novelty exception for *Penry I* claims is precluded by *Penry I*'s own dubious holding that it was not a new rule. See *Selvage* v. *Collins*, 975 F. 2d 131, 135-136 (CA5 1992). Texas procedure is under attack here for being more generous to defendants than federal law.

While the CCA made a novelty exception to the contemporaneous objection rule for *Penry I*, it did not for *Penry II*, which was a much less dramatic change. The cases *amicus* Constitution Project cites are inapposite. See CP Brief 17-18. In both *Ex parte Davis*, No. WR-40,399-6 (Tex. Crim. App., Mar. 29. 2006), and *Ex parte Robinson*, No. AP-74,720 (Tex. Crim. App., Mar. 16, 2005), the CCA held that the petitioner met the

criterion to file a successive petition and remanded to the trial court for further proceedings. Neither order states that the *Almanza* rule will be inapplicable when the merits are considered. Contemporaneous objection at trial and successive petitions are different rules and need not be governed by the same standards. Indeed, on federal habeas the two were only the same for a fairly brief period from *McCleskey* v. *Zant*, 499 U. S. 467 (1991), until the Antiterrorism and Effective Death Penalty Act of 1996 amended 28 U. S. C. § 2244(b). No principle of federal law is offended if the Texas courts take a stricter view of what is novel enough to avoid the *Almanza* standard than they do of what is novel enough to warrant a successive habeas petition.

The only remaining question is whether this case involves an "exorbitant application of a generally sound rule," *Lee* v. *Kemna*, 534 U. S. 362, 376 (2002), or, using our proposed standard from Part III, *supra*, whether the rule was applied in a way that the defendant lacked fair notice it applied or a reasonable opportunity to comply.

To the extent they are relevant here, defendant's two pretrial motions, J. A. 7-10; J. A. 11-16, assert that he has mitigation evidence outside the scope of the special issues, based on the federal law of *Penry I*, and that the trial court lacked the power to correct the deficiency. The latter contention was purely one of state law. See Brief for Petitioner 48, and n. 17. In denying the motions and proposing a curative instruction, the trial court effectively rejected the state law premise. Regarding whether the curative instruction was sufficient to fix the *Penry I* problem, the trial judge expressly invited defense counsel to make known any objections.

> "THE COURT: If you see something in that charge that you'd like worded differently or you think could be made clearer or better, I'm always willing to entertain different wording or different ways of putting the idea. So if you come up with something you like better, just let me know and I'll look at it.

"MR. MANASCO: Thank you." J. A. 21.

This case is the diametric opposite of *Osborne* v. *Ohio*, 495 U. S. 103, 124 (1990). In *Osborne*, the judge had already rejected an argument that lewdness was an element of the offense, and objecting to a jury instruction for the omission of that element would have been pointless. See *ibid.* In this case, the trial judge genuinely believed he had fixed the *Penry* problem, the only dispute being whether he had the authority to do so under state law. He expressly invited defense counsel to suggest further improvements to the fix, and counsel made none. For a defendant to make on appeal or habeas the exact objection invited but not made at trial is a prime example of a defaulted claim.

As to defendant's age and record of behavior, there simply was no federal constitutional error. To the extent that the jury charge did not provide a vehicle for consideration of defendant's other mitigating evidence, the CCA was justified in applying the *Almanza* standard, and that rule is an adequate and independent state ground of decision.

CONCLUSION

The decision of the Texas Court of Criminal Appeals should be affirmed.

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Respectfully submitted,

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